No. 11,766

United States Circuit Court of Appeals

For the Ninth Circuit

BURNHAM CHEMICAL COMPANY, a corporation,
Appellant,

vs.

BORAX CONSOLIDATED, LTD., a corporation, PACIFIC COAST BORAX COMPANY, a corporation, UNITED STATES BORAX COMPANY, a corporation, and AMERICAN POTASH & CHEMICAL CORPORATION, a corporation,
Appellees.

Brief for Appellees Borax Consolidated, Ltd., Pacific Coast Borax Company, and United States Borax Company.

MAURICE E. HARRISON
MOSES LASKY
BROBECK, PHLEGER & HARRISON
111 Sutter Street, San Francisco 4, Calif.
GURNEY NEWLIN
PAUL SANDMEYER
NEWLIN, HOLLEY, SANDMEYER & TACKABURY.
1020 Edison Bldg., Los Angeles 13, Calif.
Attorneys for appellees Borax Consolidated, Ltd., Pacific Coast Borax Company and United States Borax Company.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

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STATUTES AND RULES

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STATEMENT OF THE CASE

The case is governed by the decision of this Court in *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742, cer. den. 299 U.S. 613.

A. Nature of the Case.

1. THE ACTION.

This is an action at law[1] filed July 6, 1945. It was instituted

1. Not a suit in equity, as appellant asserts. See discussion at pages 50-54 infra.

under the antitrust laws (Title 15 *U.S.C.*, Sec. 15; *Clayton Act*, Sec. 4) for the recovery of treble damages.

2. THE PARTIES.

The plaintiff[2] is a corporation organized in 1921 in the hope of producing borax from the brines of Searles Lake in San Bernardino County, California, on certain government leases, by solar evaporation. The defendants fall in two groups. One (hereafter referred to as PCB) consists of Borax Consolidated, Ltd. and its subsidiaries, Pacific Coast Borax Company and United States Borax Company, and is engaged in mining borate ores in Kern County, California, and making borax from the ore. The other is American Potash & Chemical Corporation (hereafter referred to as AP&CC), which is engaged in producing borax from the brines of Searles Lake.

3. DATE OF ACCRUAL OF THE CAUSES OF ACTION, AND DISMISSAL BECAUSE OF STATUTE OF LIMITATIONS.

Judgment was entered in favor of defendants on the ground that the action was barred by the statute of limitations.[3]

Plaintiff's alleged cause of action accrued partly in 1925 and partly in 1928 and in no part later than January 1929, or 16 years before the action was filed.

The plaintiff's alleged damage was suffered:

1. In 1924 and 1925, when defendants allegedly conspired to have the Post Office Department issue a "fraud order", preventing the plaintiff from using the mails (Compl. para. 73;

2. The appellant was plaintiff below and the appellees defendants. For convenience the parties will be referred to as plaintiff and defendants.

3. The court remarked:

"The plea of the statute of limitations is not a technical one. No court can disregard it because of a personal desire that someone may ultimately obtain recompense for an injury alleged to have been suffered. The statute of limitations plea is as much a component part of the scheme of administration of justice as is the theory that a just claim should be given consideration by a court. There are many reasons why claims must be timely presented." (R. 805)

R. 43-45). The fraud order was issued in June 1925, and its alleged effect was to compel plaintiff to abandon the production and sale of packaged borax in competition with defendants' products (R. 44).

2. In 1928, when defendants allegedly reduced the price of borax below plaintiff's costs of production, in conspiracy, as a result of which plaintiff was driven out of business entirely (Compl. paras. 73, 76; R. 44, 45, 47). It is alleged that, pursuant to conspiracy and in order to eliminate the plaintiff as a competitor, defendants reduced the price of borax by a number of price cuts, the first of which occurred in June 1928 and the rest of which occurred "by the end of 1928" (R. 45),

> "with the result that plaintiff was losing a large amount of money due to said continued reduction in price of said borax, *and was therefore obliged to shut down and close its plant in January 1929.*" (R. 45)

In paragraph 76 of the complaint it is alleged (R. 47):

> "That, as aforesaid, the said plant and business of plaintiff was shut down and closed on or about January 1929 for the reasons herein stated."

Thereafter the plaintiff was never in business. The damage for which it prayed (para. 81, R. 53) was the exact amount allegedly invested in developing its Searles Lake plant which ceased to operate in January 1929 (para. 73, R. 45).

No overt acts of defendants causing damage to the plaintiff are alleged to have occurred after 1929. This fact was conceded in the court below:

> "The Court: * * * What overt act of the defendants in connection with the matters that are alleged, before you come to the Little Placer claim, what act of the defendants occurred that resulted in damage occurring after 1929 aside from this Little Placer claim?
>
> "Mr. Carr: Nothing. We do not allege anything." (R. 242)

With respect to the Little Placer, a parcel of land in Kern County, the plaintiff did not claim that it sustained any damages for which defendants could be liable. The allegations about the Little Placer (Compl. paras. 77-79, R. 48-52) were inserted on the theory that in a suit for treble damages the running of the statute of limitations with respect to damage incurred may be tolled by a later "overt act" in a "continuing conspiracy" although the continuance of the "conspiracy" has no relation to the plaintiff and that "overt act" causes no actionable damage to it. This is succinctly revealed in the following colloquy:

> "The Court: Is it your contention, Mr. Carr, that plaintiff was put out of business in 1929 as a result of an unlawful conspiracy and that the statute does not run as long as the conspiracy continues to be in effect?
>
> "Mr. Carr: No, I do not go that far. My idea would be that it would run from the last overt act.
>
> "The Court: What do you allege in the complaint to be the last overt act?
>
> "Mr. Carr: The Little Placer Claim * * * *We could not prove any damages from it,* but we make a live issue of that thing in the complaint * * *." (R. 234, 235)

The matter of the Little Placer is further discussed at pages 61-65 below.

4. CONTENTIONS MADE BY PLAINTIFF BELOW TO ESCAPE STATUTE OF LIMITATIONS.

In the court below plaintiff sought to escape the statute of limitations on either of two theories: (1) that of "continuing conspiracy", just referred to, and (2) the claim that the statute had been tolled by "fraudulent concealment" committed by defendants. This last claim was based on the assertion that on May 17, 1929 plaintiff's president, George Burnham, accosted Mr. Zabriskie, general manager of PCB, and accused defendants of having conspired to cut the price of borax to drive plaintiff out of business, and that Zabriskie denied the accusation.

B. The Proceedings Below.

The defendants moved to dismiss the action on the grounds that the action was barred by the statute of limitations and that no claim for relief was stated (R. 55, 56, R. 72, R. 89, 90).[4] We contended that the action was barred on the face of the complaint alone, but we also filed in support of the motion certain documentary material (R. 77-85), on the view that a "speaking motion" to dismiss is permissible under the Rules of Civil Procedure.[5] After argument, the parties stipulated in writing that the motions should be deemed to be not only motions to dismiss but also motions for summary judgment under *R.C.P.* Rule 56 (R. 105, 107). Further affidavits and documents were then filed for and against the motions (R. 108-182).[6]

In the course of the argument the plaintiff suggested to the court (Dec. 5, 1945, R. 226, 254-257) that the issue of the statute of limitations should be tried first and apart from the merits of the case, under the example of *Momand v. Paramount*

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4. The contention that no claim for relief was stated is, in our opinion, well taken, but will not be discussed since the court below placed its judgment on the statute of limitations.

5. Cf. cases such as *Central Mexico Light & Power Co. v. Munch* (2 Cir.), 116 F. 2d 85; *Boro Hall Corp. v. General Motors Corp.,* 124 F. 2d 822, 823 (2 Cir.); *Gallup v. Caldwell,* 120 F. 2d 90, 92 (3 Cir.); *Weeks v. Bareco Oil Co.,* 125 F. 2d 84, 93 (7 Cir.); *Cohen v. American Window Glass Co.,* 126 F. 2d. 111, 114 (2 Cir.); *Lucking v. Delano,* 129 F. 2d 283, 285 (6 Cir.); and cf. *R.C.P. Rule* 12(b), as recently amended.

6. When the case was later tried, most of the documents theretofore filed in support of the motions were placed in evidence by us. To avoid requiring the same documents to be reproduced in the transcript on appeal twice, in our counter-designation of the record on appeal we stated that the documents might be omitted from the affidavits with a statement that they were duplicates of trial exhibits (R. 207-212). Later, appellant had the original trial exhibits sent to this Court instead of reproducing them in the record and obtained from this Court an order that they need not be printed in the transcript (R. 824). Consequently, the documents, which constitute a major part of the evidence, are not reproduced in full in the printed transcript. However, they were read into the record in whole or in part during the trial and thus all parts which we deem material do appear in the printed record.

Pictures Distributing Company, 36 F. Supp. 568, an antitrust case.[7]

In September 1946 the court, in a Memorandum Opinion (R. 184), denied the motion for summary judgment. At a later date, during the pre-trial conference, it said:

> "I denied the motion for summary judgment because it seemed as if there might be lurking in the case some matter of weight of evidence, and in view of some of the decisions of our circuit court I felt it would be better to deny the motion and to have those matters determined preliminarily, that is, the matters that have to do with the statute of limitations." (R. 264) (And see R. 295).

While denying the motion for summary judgment, the court did not deny the motion to dismiss but, acting under *R.C.P.* Rule 12(d), reserved decision thereon until after the issue of the statute of limitations was tried. It followed plaintiff's earlier suggestion and ordered that issue to be tried first as permitted by *R.C.P.* Rule 42(b) (R. 185), and it gave defendants permission to file special answers setting up the defense of the statute of limitations without the necessity of answering the complaint generally.

The defendants filed such special answers (R. 190-193), and thereupon plaintiff moved to set the issue for trial *and demanded a jury* (R. 194). A pre-trial conference was then held to consider what issues should be presented to the jury. The court said that it was "impressed with the necessity of submitting some specific inquiry or inquiries to the jury so that we don't convert this trial of a special issue into a trial of the case", and plaintiff's counsel expressed full agreement (R. 300).

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7. The stipulation that the motions should be treated as including motions for summary judgment also provided that in the event the motions were denied the plaintiff might request a special trial of the issue of the statute of limitations (R. 106, 107).

After thorough argument and careful consideration (cf. R. 287-320; R. 262-286),[8] the court entered a pre-trial order (R. 195) that the jury should be asked to return a special verdict, as permitted by *R.C.P.* Rule 49(a), to a particular question:

> "At any time from May 17, 1929 to October 10, 1939, did plaintiff know or have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Anti-Trust laws of the United States?" (R. 195)

The case was then tried before a jury on the special issue (March 26 to April 3, 1947). Appellant strangely asserts (Brief, pp. 2, 23, 36) that defendants offered no evidence. In fact, *the great bulk of the evidence was the defendants'*. Defendants cross-examined George Burnham (plaintiff's president, principal stockholder and chief executive since 1922 (R. 396, 397)) over 164 pages of the record and offered 29 of the 31 exhibits received in evidence.

At the close of the trial, after a full opportunity had thus been given to the plaintiff to present its evidence, the court concluded that the disputed fact that might possibly be "lurking in the case" (see p. 6, supra) simply did not exist, and it directed a verdict for the defendants, i.e., directed that the answer to the question should be in the affirmative (R. 198; see opinion from the Bench, R. 800-806).

The court said (R. 781, 782):

> "We have had one witness who has testified in this case. What factual controversy is there for the jury to resolve? Nobody has disputed the questions of any conversation, the execution or sending of any document * * *
>
> * * * * * * *

8. The pages of the printed transcript from 262-286 are designated as the transcript of proceedings of January 16, 1946. This is a stenographic error; they were the proceedings of January 16, 1947 and should follow, not precede, pages 287-320, which are the transcript of proceedings of December 2, 1946.

"* * * The witness Burnham has testified to certain facts. He has testified to conversations he had with people. He has testified to letters that he wrote. He has testified to letters that he received, documents that were executed by him or received by him have been put in evidence. Now, none of those things that he has testified of a factual nature have been disputed by anyone."

And again it said (R. 803, 804):

"* * * the evidence upon the issue now before the jury is undisputed. All of the evidence shows both knowledge and good cause to believe on the part of the plaintiff during the period specified in the special inquiry, that its business had been damaged by acts of the defendants in violation of the Anti-trust Laws. * * * However, even if the statements of the president of the corporation, who was the only witness, that he had no knowledge or cause for belief be considered as evidence, * * * the evidence is so conclusive in favor of an affirmative answer upon the special issue that the court would set aside a negative reply by the jury to the special issue. Statements in writing and under oath by the witness Burnham, who was the managing president of the plaintiff, commencing in 1925 and continuing throughout the years to 1940, show without dispute a continued awareness and knowledge of the plaintiff's cause of action set out in the complaint. Not only that, but these writings make continuous claim as to the responsibility of the defendants for the loss and damage caused to the plaintiff's business. Consequently, no mere lip service to the contrary can rise to the dignity of creating a factual conflict for resolution by the trier of the fact. There has been no evidence in the opinion of the court of any fraudulent representation or concealment by the defendants of the plaintiff's cause of action which deterred the plaintiff from timely presentation of its claim in this court. The so-called Zabriskie and Emlaw conversations do not

by any stretch of the imagination go beyond denials of the plaintiff's claim. In no sense do they reach the stature of fraudulent representations or concealment of such an affirmative nature as to in law be misleading to the plaintiff. Moreover, the evidence without dispute shows the plaintiff did not rely upon the statements made by these two men and hence there is no proof of any misleading character to be attributed to them."

The special issue having thus been disposed of, defendants' motions to dismiss came up for disposition (R. 806), were further argued and briefed, and some weeks thereafter, on May 5, 1947, were granted upon the statute of limitations (R. 199), and judgment was entered May 9, 1947 dismissing the action (R. 199).

C. The Facts Established at the Trial.

In June 1928 the plaintiff first opened its borax plant for production. That very month, the very month it started production, its two competitors, the PCB group and AP&CC, simultaneously cut the price of borax drastically to a point below plaintiff's cost of production (R. 505, 506). As a result plaintiff was driven out of business by January 1929.

1. THE "THURMAN ARNOLD LETTER," SHOWING PLAINTIFF'S CONVICTION EVER SINCE 1928.

Plaintiff's state of mind continuously throughout the years following the price cuts of 1928 is fully revealed by a letter which it wrote on November 22, 1939 to Mr. Thurman Arnold, then Chief of the Antitrust Division of the Department of Justice (Def. Ex. A, R. 397). The letter reads in part as follows (R. 398-401):

> "Referring to a conversation which I had with Mr. Berge the other day, I understand that the Anti-Trust Division of the Department of Justice is investigating the alleged

violation of the Sherman Anti-Trust Laws by the Fertilizer Industries * * * The American Potash & Chemical Corporation and the Pacific Coast Borax Co. are both English-owned companies, and the two together constitute the *British Borax Trust.* Hence, the price of potash in America is practically under the control of the British Borax Trust.

"The Burnham Chemical at one time had a Government lease at Searles Lake, and was planning to make potash, borax and other chemicals from that deposit. We completed a plant in 1928 for the production of borax, and we expected, through the profits we made in borax, to add a potash plant and also make other chemicals and gradually grow to become a large producer. * * *

"*However, the very month the Burnham Chemical Co. started production of borax, in June, 1928, a drastic cut in the price occurred, with the result that, in a few months, we were forced out of business.* From outward appearances, it appeared that the price war on borax was between the two big English producers—namely, the American Potash & Chemical Corporation and the Pacific Coast Borax Co. The fact that the main price cutting in the price war started the month we began production **convinces** us that it was aimed purposely to destroy us. At least that was the resulting effect of the price war.

"We took the matter up with our attorneys, Francis J. Heney and B. D. Townsend, to see if we did not have a case against the Trust for violating the Sherman Anti-Trust Laws. These attorneys, who are now both deceased, felt that we had a case, but we were so completely ruined as a result of the price war, and also in debt, that we were financially unable to employ the attorneys to go ahead with the matter.

* * * * * * *

"Enclosed you will find a copy of a letter written by Mr. B. D. Townsend to H. S. Hinrichs, dated July 26, 1928, in which Mr. Townsend points out certain features of the unfair methods of competition being used by the British Borax Trust.

"There is also enclosed the preliminary draft of an article entitled 'Foreign-Owned Monoply vs. the People of the United States.' It is really a history of the Burnham Chemical Co."

We shall refer to each enclosure later (see pages 22-23, 37-43, infra).

Thus ever since 1928 the plaintiff was convinced that it had been driven out of business by acts of the defendants in violation of the antitrust laws.

2. PLAINTIFF'S CONVICTION CONCERNING DEFENDANTS' VIOLATION OF THE ANTITRUST LAWS AND ITS DISTRUST OF DEFENDANTS PRIOR TO MAY 17, 1929.

(a) Plaintiff's Accusations Against Defendants in 1923.

Continuously for years before 1928 the plaintiff had thoroughly distrusted its competitors, AP&CC and PCB, and believed that they were resorting and would continue to resort to every means to drive it out of business, and that their word could not be trusted. For example, in a letter written on October 19, 1923 to Post Office Inspector McKean (Def. Ex. D, R. 452), who was investigating plaintiff, the plaintiff charged (R. 453):

"However, the success of our enterprise is not looked upon with favor by our potash and borax competitors. Our chief competitor who is said to be controlled by the Borax Consolidated of London, England, would be seriously affected * * *. They have therefore taken steps to hinder our development * * *.

"We have reason to believe that there are unseen forces at work tending to hinder the financing of our enterprise * * *"

and by "competitors" and "unseen forces" plaintiff here meant AP&CC and PCB (R. 454, 456).

In another letter written in October 1923 to Mr. McKean (Def. Ex. E, R. 457), plaintiff expressed hesitation "to furnish

anyone other than the Department of the Interior with a list of our stockholders," "owing * * * to the present active opposition of parties interested in preventing us from succeeding with our enterprise" (R. 458). Plaintiff here referred to AP&CC, PCB (R. 458), and to "all" whom it has "sued as defendants in the present action" (R. 464). Its "belief and suspicion" "that its competitors were trying to injure" it "was of long standing," "went back to these dates in 1923" and "was strong enough to prevent us from giving our stockholders' lists to anybody." (R. 464, 465)

In October 1923 plaintiff also wrote a letter (Def. Ex. F, R. 465) to Mr. Varley of the United States Bureau of Mines, who also was investigating plaintiff (R. 466). The plaintiff charged:

> "Our potash and borax competitors do not look with favor upon the position of our making potash and borax at such a low figure. In fact, we have reason to believe that there are influences apparently at work against the development of these Government borax and potash deposits at Searles Lake, which make it exceedingly difficult to finance our enterprise" (R. 466)

and by this plaintiff referred to AP&CC and PCB (R. 470).

(b) Plaintiff's Accusations Against Defendants Upon Issuance of Fraud Order, and in the Carson City Suit—1925, 1926.

No sooner was the Post Office fraud order issued against plaintiff in June 1925 than it immediately suspected that the present defendants were responsible, but George Burnham noted in his diary a resolution to make no accusations until he had more than surmise (R. 427, 428). But his hesitation soon vanished as his belief became conviction.

In September 1925 the plaintiff filed a suit in the United States District Court for the District of Nevada against the Postmaster to enjoin and set aside the Post Office fraud order (R. 643), entitled *"Burnham Chemical Company, George B.*

Burnham and V. E. Scott, plaintiffs, v. *George F. Smith, Postmaster of the United States in Charge of the Post Office at Reno, Nevada,* defendant," Equity No. 75. For convenience we shall refer to this as the *Carson City suit.* On November 6, 1925, Burnham sent a circular letter to his stockholders (Def. Ex. Q, R. 572) in which he said:

> "The company is ably * * * managed, aggressively going forward on the highroad to production of borax on a huge scale, *and that is the very reason our competitors* [i.e., AP&CC and PCB] *apparently instigated an unjust Post Office action against us—apparently they see the handwriting on the wall—they fear that the new Burnham plant is going to lead the world in borax production!*" (R. 572)

In December 1925 Burnham wrote another circular letter to his stockholders (Def. Ex. AA, R. 643), referring to the

> "unwarranted action by the Post Office *which we contend was inspired by large competitors who are naturally alarmed that the new Burnham plant will become a formidable factor in the borax field.*
>
> "* * * they have good and sufficient reasons for regarding us as competition to be reckoned with. * * * we propose to give our competitors a fair fight for supremacy in the field. But our fight will be in the open and only by the fair methods known to reputable American institutions." (R. 643, 644)

In February 1926 Burnham again wrote his stockholders (Def. Ex. AB, R. 645), describing the action of the Post Office as being "apparently at the instigation of certain foreign-controlled competitive chemical interests evidently seeking to be the only ones to recover these great rich deposits of borax and other minerals and who apparently had long been working in the dark to accomplish their ends," the "foreign controlled competitive interests" here referred to being AP&CC and PCB (R. 645).

By April 1926, plaintiff was thoroughly convinced that the defendants had conspired in violation of the antitrust laws to drive it out of business and to obtain the fraud order as a means thereto, and on April 14, 1926 it filed in the Carson City suit against the Postmaster a *printed* Amended Complaint. George Burnham verified and swore to this under oath.

This Amended Complaint (Def. Ex. C, R. 407), with much embellishment,

1. Charged that the present defendants, i.e., AP&CC and PCB, had conspired to obtain the issuance of the fraud order in order to drive the plaintiff out of business.

2. Accused these defendants of constituting a monopoly, a borax trust and a conspiracy in restraint of trade, all in violation of the antitrust laws of the United States.

3. Called on the United States Government to prosecute these defendants under the antitrust laws.

This document is 77 pages of fine print, on legal size paper (not counting exhibits), and pertinent passages were read into the record at pages 409 to 423. We summarize and quote portions below:—

One Dr. Stewart, an official in the Bureau of Mines, was appointed by the Secretary of the Interior at the Postmaster General's request to investigate the plaintiff (R. 410, 411). In February 1925, Dr. Stewart submitted to the Post Office Department a report. Plaintiff alleged that "The contents of said so-called 'report' and the official opinions and actions of Dr. Stewart in the premises, were influenced by certain false and defamatory propaganda and other acts on the part of the competitors of the Burnham Chemical Company" (p. 6; R. 409, 410). The pleading then proceeded to describe (Para. IX, p. 18, R. 411) the "Defamatory Propaganda by Borax Trust [i.e., AP&CC and PCB (R. 411)] against Burnham Chemical Company and Burnham Solar Process" and alleged:

"Thus, not only will both of said companies be affected as competitors by the developments and operations of the Burnham Chemical Company, but both of them are interested in preventing the Burnham Chemical Company * * * from developing or operating any plant or process for the recovery of any of the salts contained in the brine of Searles Lake.

"(b) By reason of the premises, *for more than six years last past, said competitors* [i.e., AP&CC and PCB (R. 413)] *have engaged in efforts (most of them in secret) to injure and discredit, and prevent the success of, the 'processes, plans and developments' of the Burnham Chemical Company.*"

* * * * * * *

"(c) * * * the aforesaid competitors of the Burnham Chemical Company well knew of said assignment of Dr. Stewart and the antecedent facts in the premises hereinbefore stated; and further knew that the Burnham Chemical Company was then about to commence the production of borax. Thereupon, the aforesaid competitors resumed and increased their aforesaid efforts to injure and discredit, and prevent the success of, the 'processes, plans and developments' of the Burnham Chemical Company. Their ultimate objects in the premises were, first to prejudice the general public against the Burnham Chemical Company, so as to defeat the efforts of the company to finance its enterprise through the sale of its capital stock to the public; second, to discourage dealers in borax from dealing with the Burnham Chemical Company, by convincing them that the Burnham Chemical Company would not be able to develop and maintain a dependable production, because of its financial weakness and because of a doubt (falsely induced by said competitors) concerning the practicability of its process. *Their immediate object was to prejudice and deceive the Postmaster General and the officers and agents of the Post Office Department* engaged in conducting said investigation, and particularly Dr. Stewart and the other officers and agents of the U. S. Bureau of Mines

engaged therein as aforesaid, *and thereby procure and induce the issuance of a fraud order against the Burnham Chemical Company* and Mr. Burnham individually. To that end, among other things, the aforesaid competitors of the Burnham Chemical Company, through their officers and agents, influenced, procured and induced the false and defamatory propaganda concerning, and attacks upon, the Burnham Chemical Company and Mr. Burnham individually, hereinafter set forth." (R. 413-415)

The pleading then alleged numerous acts of defendants in 1924 and 1925 to spread defamatory propaganda against plaintiff in the form of editorials in trade and scientific journals, including expulsion of Burnham from the American Chemical Society. It alleged that "by means of said false and defamatory editorials and otherwise," "said competitors of the Burnham Chemical Company discouraged dealers in borax from purchasing any of the small quantity of borax which the Burnham Chemical Company then had on hand," that "said competitors * * * caused said defamatory editorials to be brought to the attention and knowledge of Dr. Stewart, within a few days after they were published, respectively, and conveyed to Dr. Stewart divers other false and defamatory statements in the premises," that they did all these things

"for the immediate purpose (among others as hereinbefore stated) of influencing the official opinion and action of Dr. Stewart in the premises, and (through Dr. Stewart) the official opinion and action of the officers and agents of the Post Office Department, and particularly the Solicitor for the Post Office Department and the Postmaster General, in the investigation, consideration and disposition of the aforesaid charges against the Burnham Chemical Company and Mr. Burnham individually. * * *

"(k) Plaintiffs are informed and believe, and therefore allege, that the aforesaid false and defamatory propaganda and attacks did influence the official opinion and action of Dr. Stewart in the premises; and thereby, and otherwise, did influence and induce the subsequent official opin-

ion and action of the Solicitor for the Post Office Department and the Postmaster General, respectively, as hereinafter set forth." (R. 412-418)

The pleading further alleged (para. X, p. 21; R. 419), under the caption "False and Misleading 'Report' by Dr. Andrew Stewart Concerning Investigation by U. S. Bureau of Mines" that Dr. Stewart's report to the Postmaster General

> "concealed and misrepresented the true facts in the premises, and consisted mainly of a repetition of the false and defamatory propaganda disseminated by the competitors of the Burnham Chemical Company as aforesaid, disguised in new verbiage, and presented to the Postmaster General and the Post Office Department, ostensibly as the impartial views of the U. S. Bureau of Mines." (R. 419)

The pleading then charged, and we call particular attention to this:

> "that the difficulties encountered by Mr. Burnham in marketing said small amount of borax then on hand were created by the aforesaid competitors of the Burnham Chemical Company for the express purpose, among other things, of discrediting the Burnham Chemical Company and furnishing some false and fictitious ground upon which a fraud order could be based; and that said monopolistic restraint of the commerce in borax was and is a flagrant violation of the laws of the United States, and could and should be prohibited by criminal and civil proceedings instituted by the United States; and Dr. Stewart further knew that said circumstances demanded the prosecution of the Borax Trust under the Anti-Trust Laws of the United States, but did not warrant or justify the prosecution of the Burnham Chemical Company or Mr. Burnham under the Postal Laws of the United States." (p. 24; R. 419, 420)

By "Borax Trust" plaintiff here again meant AP&CC and PCB (R. 420).

With great prolixity the pleading then charged that

> "Dr. Stewart's so-called 'report' was in effect a complaint or petition on the part of the competitors of the Burnham Chemical Company, with the true authorship of said document concealed, to procure and induce the issuance of a fraud order in the premises, for the purpose of destroying the Burnham Chemical Company, and thereby averting competition (otherwise inevitable) in the production of borax, potash and other salts from the brine of Searles Lake; and for the further purpose of enabling the Borax Trust to maintain its monopoly of the commerce in borax, in violation of the laws of the United States." (p. 25; R. 420, 421)

The pleading also alleged (para. XXIX, p. 73, R. 421, 422) that the

> "effect of the fraud order was to taint the reputation of the company and its officers with suspicions of fraud and dishonesty, and greatly impair their commercial credit. * * * *In the meantime, the company must enter into competition with a strongly entrenched foreign-owned trust,* which controls nearly 90 per cent of the borax trade of the world, and *which is keen to take advantage of every weakness of its competitors.* Already, the fact of the issuance of the fraud order and the effects of it have been extensively published and advertised with every possible derogatory and damnifying insinuation and innuendo."

And in paragraph XXX, p. 75 (R. 422, 423), under the caption "Additional Facts Concerning Efforts of Borax Trust to Preclude Development of Burnham Solar Process; Concealment Thereof from Solicitor and Postmaster-General," the pleading alleged "that by their unlawful violation of their contractual obligations, and their subsequent unlawful assertion of rights adverse to Mr. Burnham as hereinbefore stated, the Pacific Coast Borax Company * * * intended, and attempted, to render Mr. Burnham financially helpless and permanently preclude the development of the Burnham Solar Process, for the

reason that it would virtually destroy the value of their existing plants, constructed and installed to operate under more expensive processes, with an investment exceeding $30,000,000." (R. 422).

Allegations were made of efforts of PCB to obtain a lease at Searles Lake in order to exhaust

> "the entire chemical deposit of Searles Lake, and to have transferred it to the ponds of the Pacific Coast Borax Company; and thereby the Pacific Coast Borax Company would have secured virtually a permanent monopoly of the production of potash and borax in the United States, so far as concerns the present known deposits thereof,"

And it was alleged that Burnham foiled this scheme (R. 423).

When Burnham verified this pleading in 1926 he believed what it said and he believed that his attorney, Townsend, "had good grounds" to put the allegations into the document (R. 433). Plaintiff caused it to be printed and distributed over 7000 copies (R. 432).

(c) The Mather Letter.

The complaint in the present case charges that defendants caused the fraud order to be issued through a "highly placed federal government representative who formerly had been * * * Chicago manager and representative of defendant Pacific Coast Borax Company." (R. 43). The man referred to was Stephen Mather, father of the National Park Service (R. 483, 484).

Subsequent to the filing of the Amended Complaint in the Carson City suit, C. W. Whitney, a director of plaintiff, received from Stephen Mather a letter dated October 8, 1926, in response to an inquiry, in which Mather claimed responsibility for the issuance of the fraud order (Def. Ex. G, R. 481). Burnham saw this letter shortly after Whitney received it (R. 482, 489). It inflamed and confirmed his previous beliefs. He attached the greatest significance to it, had it photostated, and preserved it in a safe-deposit box until the present time (R. 483).

For example, thirteen years later, on November 18, 1939, six years before the present suit was brought, plaintiff wrote a letter to the Secretary of the Interior of the United States (Def. Ex. H, R. 484, 485), enclosed a copy of the Mather letter, and charged:

> "We believe that it was the influence of foreign-owned interests in the halls of government which was behind all of the difficulties of the Burnham Chemical Co. * * * The reasons we are led to believe this are as follows: Stephen T. Mather was the one-time Chicago manager of the Pacific Coast Borax Company and was assistant to the Secretary of the Interior from 1915 to 1917 and was a Director of the National Park Service of the Department of the Interior from May 16, 1917, up until the time of his death about 1930 (See Who's Who in America, 1926). While he held this high government position he was also Vice-President of the Stirling Borax Company which is a subsidiary of Pacific Coast Borax Company, a foreign-owned enterprise. Stephen T. Mather admits that he was in a measure responsible for the Post Office fraud order being issued against the Burnham Chemical Company in a letter dated October 8, 1926, written to Clarence Whitney, one of the directors of the Burnham Chemical Company. * * * * * * * * * * *
>
> "Mr. Mather himself admits the process may be all right and the foreign-owned *Borax Trust* itself endorses the process. *And so they were afraid we would be a formidable competitor and Mr. Mather informed the Post Office to issue a fraud order so we could not raise funds.* Mr. Mather was a high Government official and also an officer and stockholder in the British-owned Borax Trust." (R. 486, 487)

In March 1927 Whitney called on Mather to see whether, in having the fraud order issued, Mather had acted for Burnham's competitors or for the public interest. Whitney "was not satisfied" with Mather's explanation, nor was Burnham (R. 491).

The Mather letted loomed so large in plaintiff's mind that in January 1929 it asked its attorney Townsend to call on Mather

in Chicago (Def. Ex. I, R. 492, 493), and early in May 1929 Burnham made a diary reminder to check further Mather's connection with PCB (R. 494).

Then, a few days later, on May 17, 1929, Burnham called in New York on C. B. Zabriskie, then General Manager of PCB. When he walked into Zabriskie's office, he saw Mather's picture on the wall (R. 494), and the fact made a tremendous impression on him. (R. 496).

> "Q. And you believed at the time you talked to Mr. Zabriskie that Mr. Mather's reason for getting that fraud order issued was to injure the Burnham Chemical Company, in order to benefit its competitors, Pacific Coast Borax Company, and American Potash & Chemical Corporation. * * * Was that what you believed at the time you talked to Zabriskie? I am trying to get your state of mind then. You said you were very much impressed by the fact that his picture was on the wall. Was that why you were much impressed by it? A. Yes.
>
> "Q. Because at that time you had that belief in your mind? A. That is right." (R. 499, 500)

Though he was of this belief, he did not mention the matter to Zabriskie, Zabriskie said nothing to him about it, and later in May 1929 Burnham tried to call on Mather in Chicago "because of the price cut in borax" in 1928 as the result of which plaintiff was "forced out of the borax business", Burnham's "suspicions were aroused again", and he wanted to "see whether or not he [Mather] had some ulterior motive" (R. 498, 499).

The Mather letter arises repeatedly as an item of importance in plaintiff's mind. In July 1934 Burnham consulted plaintiff's attorney, Townsend, concerning the monopolistic drive of the PCB group and his suspicions concerning the defendants (R. 501), and Townsend told him to take important documents to Washington, specifically mentioning the Mather letter, "to help [his] cause along" as evidence of defendants' intent to injure plaintiff (R. 502). Both Townsend and he thought it might be evidence "to support the charge of conspiracy between the

Pacific Coast Borax Company and the American Potash & Chemical Company to injure [his] company", of being "responsible for the Post Office Fraud Order * * * and for other acts injuring the Burnham Chemical Company" (R. 502, 504). And in September 1939 plaintiff again went east and took the letter with him (R. 505).

(d) Plaintiff's Attorney Advises It in 1928 that Defendants Had Violated Anti-trust Laws to Its Damage and Warns Against Defendants' "Excuses and Explanations" of Price Cuts as "Cloaks and Disguises."

Plaintiff followed the price cuts of 1928 very closely (R. 507) and immediately consulted his attorneys Francis Heney and B. D. Townsend, to ascertain its rights against the present defendants. Townsend wrote a letter to a Washington attorney, Hinrichs, and gave a copy to plaintiff which it treasured ever since (R. 509). This letter (Def. Ex. J, R. 510), written July 26, 1928, contains these passages:

> "A condition has arisen in the borax industry, concerning which I may be asked to render an opinion upon the following question:
>
> > "If two concerns already in control of the borax market, not only in the United States but in the whole world, engage in a price war, by selling at prices which preclude any profit, and the immediate effect of which will be to kill off the only potential competitors; is the transaction one which may properly be made the subject of action by the Federal Trade Commission, under the 'unfair competition' clause (Section 5) of the Federal Trade Commission Act?
>
> "There are other features of the transaction which might strengthen the case. For example, I am inclined to think that the present competition, although very bitter in form, and apparently in earnest, is in fact designed by the controlling heads of these two concerns (and which are located in England) for the express purpose of killing off threatened competition, although their subordinates may not really know that to be the fact. * * *

"I had given some consideration to the terms of the Federal Trade Commission Act; and I have read the discussion of 'Price Cutting as a Form of Unfair Competition', in Henderson's book, 'The Federal Trade Commission,' written in 1924, including the four cases discussed at pages 246 to 261. * * * From my limited consideration of the question, I am inclined to the opinion that proof of a persistent maintenance of prices at such a low level as to preclude profit, for a period of approximately two years, with proof that the direct effect thereof is to crush attempted competition, would constitute 'unfair methods of competition in commerce,' within the meaning of the law. Stating it more precisely: I think that proof of those facts would constitute a prima facie case and would throw upon the parties employing those methods the burden of justifying them. * * * (R. 510-512)

* * * * * * *

"* * * If these two English concerns are engaged in actual competition, then the present price war is even more clearly a case of 'unfair methods of competition in commerce'; while, on the other hand, if they are not engaged in actual bona fide competition, then the present ostensible price war could have no other purpose than to prevent the establishment of any competitors in the business." (R. 513)

Plaintiff understood this letter to refer to PCB and AP&CC (R. 514).

In November 1928 Townsend gave Burnham an opinion letter (Def. Ex. K, R. 515), advising that "I am now convinced that proceedings before the Federal Trade Commission would result in substantial benefits to those interested in the subject" (R. 517). Attached to the letter was a memorandum entitled "Application of Federal Trade Commission Law to Borax Trade Conditions" (Def. Ex. L, R. 518), in which Townsend said:

"For about three years, and particularly during the past year, a persistent price-war has been waged in the Borax Trade, until the price has been reduced to a point below

actual cost of production, if all of the actual elements of production-cost are included in the computation, and the methods of computation are otherwise correct.

"This situation imperils the continued existence of competition in the Borax Trade, and will ultimately lead to the establishment of an absolute trust, if the causes of the situation are not terminated.

"Various excuses and explanations are offered by those responsible for this situation, but it is quite evident that these excuses and explanations are mere cloaks and disguises, and that an adequate investigation of the subject will develop proof that this situation is the natural and inevitable result, and therefore the very object and purpose, of trade practices which are in violation of the Federal Trade Commission Act, also the Federal Anti-Trust Laws.

"These unlawful practices may be concealed by clever theories and ingenious accounting devices, but when the true facts are disclosed, the very cleverness and ingenuity employed to cloak and disguise the true facts, will become added and persuasive proof of consciousness of an illegal purpose.

"If this matter is to be brought to the attention of the Federal Trade Commission, there should be little or no discussion of the facts or the methods by which they may be established, until they are presented to the Commission; otherwise there is danger, no matter how cautiously the subject is handled, that the party charged may learn the methods to be employed to expose the true facts, and may then defeat the most thorough and intelligent investigation by the Federal Trade Commission investigators.

"*This caution is especially applicable to cases where the illegal practices have been cleverly concealed or disguised.*" (R. 518, 519)

(e) Plaintiff's Advice to Its Stockholders in Early 1929 Concerning Price Cuts.

In January 1929 plaintiff sent a circular letter to its stockholders (Def. Ex. M, R. 521), which contained these passages:

"Some very important developments in the borax market have been taking place in recent months which have vital significance, *in spite of the fact that the apparent motives back of them are being carefully camouflaged.* For the past hundred years, in fact during its entire history, the price of borax has never been below $75 per ton delivered. *It is rather a peculiar coincidence that last summer, just at the time we were getting ready to produce and put our product on the market, the price dropped to $50 per ton delivered.* * * * It means that we cannot make any profit on our borax. * * *

* * * * * * *

"It has been urged by some who are familiar with the situation that in selling borax at $50 per ton our competitor is selling below actual cost of production, if correctly computed; *and that this remarkable cut in the price of borax is nothing but a price war to destroy competition, and particularly the competition of young competitors who are struggling to become established.* This matter has been under consideration for some time, and, for obvious reasons, the subject was kept confidential while it was under investigation. That is the reason why this price war has not been mentioned to you until the present time; and, for the same general reason, further discussion of it will not be indulged in at this time. * * *" (R. 521).

In March 1929 plaintiff sent another circular letter to its stockholders (Def. Ex. N, R. 523), in which it said:

"But just as we went into production came the slash in the price of borax. The price dropped to the lowest level in the history of borax production. A drop of more than 50 per cent in the price of borax at the plant. * * * We believe no one is really making a profit, * * * Your company, an infant in the industry, without definitely established markets, without surplus or reserve, was hit the hardest. * * *

* * * * * * *

"Let us take stock of our resources. What have we? On close checking we believe that we have quite a lot.

> True enough, not much to put on the market for a quick sale, under the conditions, but a big thing if properly developed. * * * *What is wrong then? Nothing fundamentally, except that some sinister forces apparently are trying to rob us of what is rightfully ours. They know our weak point (lack of surplus and reserve) and they are trying to take advantage of it.*" (R. 523-525)

Plaintiff admitted that by "sinister forces" he meant PCB and AP&CC.

Immediately before calling on Zabriskie in May 1929 Burnham visited some of his eastern stockholders and told them "that the price cuts by the defendants had occurred simultaneously and in the very month [plaintiff] started production" and that he thought that "was a peculiar coincidence" (R. 543).

(f) Defiance of Plaintiff by, and Plaintiff's Disbelief in, AP&CC, and Its Distrust of PCB—December 1928 to May 1929.

On December 26, 1928, plaintiff called on Mr. Emlaw, president of AP&CC, and accused Emlaw and his company of infringing plaintiff's patents. Emlaw denied the accusation and was "angry and defiant", and Burnham did not believe the denial (R. 527). On leaving Emlaw, Burnham called the same day on Zabriskie, General Manager of PCB, and asked him to put up $50,000 to finance plaintiff in a patent infringement suit against AP&CC (R. 528, 534). As an inducement to PCB to do this, Burnham told Zabriskie that "if the American Potash & Chemical Company were infringing our process, and we prevailed in a suit against them, then they would have to pay us royalties, and, of course, that would increase the price of borax". "would benefit the Pacific Coast Borax by raising the price" and "would be a legal way of protecting ourselves on the drastic cut in price" (R. 528, 529).

Burnham followed up with a letter to PCB on the subject on January 15, 1929 (Def. Ex. O, R. 530). The letter contains these passages:

"After a careful investigation and consideration of the matter, we became convinced that the American Potash & Chemical Corporation was, and for a long time had been, engaged in flagrant violations of our [borax] patent rights; whereupon we served upon them a formal notice of infringement on October 31, 1927.

"2. In the meantime, the American Potash & Chemical Corporation has engaged in a persistent and flagrant price war, as to borax, reducing the price to $50 per ton or less, delivered anywhere in the United States. *We are reliably informed that the prices quoted by this company* in the present month and for several months last past, *are below its actual cost of producing borax,* if such production cost be accurately and properly computed, and we are further reliably informed that the specific purpose of this price war is to destroy competition as to borax.

"3. * * * *We are advised by our attorneys that, under these facts, the American Potash & Chemical Corporation* is engaged in an 'unfair method of competition,' within the provisions of the Federal Trade Commission Act, and allied acts." (R. 530-532)

By "allied acts" plaintiff referred to the antitrust laws (R. 532). The letter concluded "that the very institution of a suit by us as above proposed will result in an immediate increase of the price of borax of not less than $10 per ton, and this increase alone will much more than offset the cost to your company of such benefits of the above proposition." (R. 532)

After receipt of this letter and before May 1929, PCB refused to finance plaintiff's lawsuit. This refusal added to the plaintiff's conviction that PCB and AP&CC had conspired together to cut prices.

"Q. Then, when Mr. Zabriskie refused to advance the money to assist you in bringing a patent suit against the American Potash & Chemical Corporation so that you could get the price up, you attached significance to that, did you?

"A. Well, I felt very certain that the American Potash was infringing our patents and the very fact that Zabriskie,

who wouldn't cooperate in any way to help us, and incidentally help himself for supporting our infringement suit against the American Potash & Chemical Company, *the very fact that he wouldn't cooperate gave me added belief* or suspicion *that he was cooperating with the American Potash & Chemical Company and cooperating with them to cut the price in order to drive us out of business.*" (R. 534, 535)

At this time, too, litigation over mineral patents was pending between PCB and plaintiff and continued for several years (R. 553-554), and in it plaintiff was accusing PCB of dishonesty and fraud (Cf. R. 673).

3. ALLEGED CONVERSATIONS OF MAY 17, 1929.

Plaintiff claims that on May 17, 1929, Burnham again called on Zabriskie in New York. Since Zabriskie died in the early 1930's, and no one else is said to have been present, we know nothing of this visit except as Burnham tells it. Burnham *accused PCB of conspiring with AP&CC in the matter of the price cuts* in order to injure the plaintiff (R. 536), and Zabriskie denied the accusation. Burnham never thereafter saw him again (R. 536). Then Burnham immediately called on Emlaw, president of AP&CC, and despite the alleged denial by Zabriskie, *Burnham repeated the same accusation to Emlaw* (R. 536). He did not, however, repeat the accusation of patent infringement which he had made the previous December, although he still disbelieved Emlaw's denial (R. 539).[9]

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9. "Q. When you called upon Mr. Zabriskie on the morning of May 17, 1929, you accused him, did you not, of conspiring with the American Potash & Chemical Corporation for the deliberate purpose of driving you out of business?

A. Yes. * * * I told Mr. Zabriskie, 'It looks to me like you fellows were cutting the price of borax purposely, deliberately, to drive the Burnham Chemical Company out of business.

Q. And you called his attention to the fact that the price cut had occurred the very month you started production? A. Yes.

Q. You talked to Zabriskie that morning, and then you went right over to see Mr. Emlaw that afternoon, only taking time for lunch did you not? A. Yes.

When denying plaintiff's accusation, Zabriskie mentioned the "large production, the over production and the cheaper source of borax in the Kramer District" (R. 546), and Emlaw said "that they had an immense production, and that their production had gone up by leaps and bounds" (R. 547), but neither Zabriskie nor Emlaw gave any actual production figures and both spoke in generalities only (R. 547). Moreover, what they said about increased production and cheaper costs was true, and Burnham already knew it as he had previously made an independent investigation, but he did not believe that these factors sufficed to explain the sudden nature of the price cuts and their timing (R. 547).

> "Q. So when you went to see those gentlemen on May 17 you knew there was overproduction and a large amount overhanging the market, did you not?
>
> "A. Yes, but I could not understand why there should be such a cut in the price of borax the very month we started production.
>
> * * * * * * *
>
> "Q. And the only thing they told you that morning that you did not already know was their denial that they had deliberately done this price cutting for the purpose of driving you out of business, isn't that true?
>
> "A. Well, except for this: I could not understand why it should go so low, even though there was an over

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Q. And when you called upon Mr. Emlaw in the afternoon you accused him of cutting prices in conspiracy with the Pacific Coast Borax for the purpose of injuring your company, did you not?

A. Yes. * * * and I told Mr. Emlaw about the same as I told Mr. Zabriskie, namely, 'It looks as though you had cut the price on borax for the deliberate purpose of driving us out of business.

Q. *You made that accusation as firmly as you could with politeness, did you not?* A. Yes, that is right.

Q. Did you tell Mr. Emlaw why it was that you believed he and Zabriskie's company were conspiring to drive you out of business?

* * * * * * *

A. Yes, substantially the same as I told Mr. Zabriskie.

Q. That is to say, it seemed very strange that the price was cut in half the very month your company started production? A. Yes.

Q. And that they knew you were starting production in that month?

A. Yes." (R. 544, 545)

supply. I could not understand why it should go down so low as $13 a ton in bulk." (R. 548, 549)

As a matter of fact, the statements allegedly made by Zabriskie and Emlaw about increased production and lower costs of production were the very "excuses and explanations" that plaintiff's attorney Townsend had told him were mere "cloaks and disguises" the previous November (see p. 24, supra). Thus, Burnham admitted that he "understood that one of the excuses which Mr. Townsend referred to as being a mere cloak and disguise was the claim that the Kramer field was a cheaper source of supply for borax" and "that was also one of the statements made * * * by Mr. Zabriskie in May 1929 as an excuse or explanation for the price cut." He admitted that by "the various excuses and explanations" Townsend was referring "to the fact that there were improved processes for making borax * * *; also because the Kramer field was a cheaper source of borax supply * * * and also because there was an over-supply of borax on the market" (R. 552, 553).

After these alleged conversations with Zabriskie and Emlaw, Burnham told neither his stockholders nor his Board of Directors of them (R. 648).

4. CONTINUOUS REASSERTION BY PLAINTIFF AFTER MAY 1929 OF ACCUSATIONS AGAINST DEFENDANTS IDENTICAL WITH THOSE THERETOFORE MADE.

(a) Solemn Reassertion in Carson City Suit, January 1930.

In January 1930 a hearing was held in the Carson City action before Judge Norcross on the plaintiff's application for a temporary injunction against the Postmaster (R. 555), and plaintiff reiterated and embellished all the accusations which it had made against the present defendants before May 1929 (see pages 12-19, supra). On January 15, 1930, plaintiff filed an affidavit by George Burnham in support of its application (Def. Ex. P, R. 556). In this affidavit Burnham said that cer-

tain portions of the Amended Complaint in the cause were true of his own knowledge (cf. R. 557-560), and then added, to make sure that there would be no mistake about plaintiff's beliefs and convictions, its charges and accusations,

> "At the commencement of this affidavit, affiant stated that certain portions of the amended complaint are true as affiant's personal knowledge. *To the end that there may be no misunderstanding: as to the matters in the amended complaint which are not within the personal knowledge of affiant, affiant is reliably informed that they are true, and verily believes them to be true.*" (R. 561)

Burnham believed then and subsequently that "*I had good reason to believe that they* [the accusations in plaintiff's pleading in the Carson City action] *were true*" (R. 565).

Moreover, the affidavit stated the facts as to the price cuts, "As our plant was completed, and our operations begun, the price of borax was still further reduced * * * and the Burnham Chemical Company could not make a profit * * *" (R. 565, 566). And it concluded:

> "The immediate effect of this price war was to compel the Burnham Chemical Company to suspend operations at the end of the year 1928. *It appears quite certain that this price war was intended to be only temporary, to accomplish some object beneficial to the authors thereof, and that normal prices will ultimately be restored.*" (R. 567)

By this he referred to and meant the intentions of AP&CC and PCB (R. 570).

(b) Plaintiff Inflamed Again in 1934 and Consults Counsel.

In 1934 the plaintiff's beliefs concerning defendants' violation of the antitrust laws were again inflamed. There had been only three companies mining borate ore,—PCB, Western Borax Company, and Suckow Borax Company; by 1934 PCB had taken over Western and was about to acquire Suckow; Burnham knew the fact and was aroused (R. 576, 580), for the only

other source of borax was Searles Lake, and most of the production from it was in the hands of the defendant AP&CC (R. 576). "In other words, on July 30, 1934, I realized that the Pacific Coast Borax group were getting almost a complete monopoly of the Kramer borax district" (R. 574, 575).

Therefore, on July 30, 1934 plaintiff again consulted its attorney Townsend and Francis J. Heney, who had become Judge of the Superior Court in Los Angeles (R. 576, 577). Townsend told him that Mr. Neblett, a law partner of Senator McAdoo, had recently and publicly accused PCB of being an illegal monopoly in violation of the antitrust laws (R. 580, 581).

(c) Glavis Letter and Conversation, 1934.

On Townsend's advice Burnham then went to Washington and carried with him a letter of introduction from Judge Heney to Mr. Louis Glavis, head of the Bureau of Investigation of the Department of the Interior. This letter of introduction (Def. Ex. R, R. 584), dated August 23, 1934, said:

> "Dear Louis:
>
> This will introduce my friend and former client, George B. Burnham, who desires to talk with you about a matter which I think it is well worth you while to investigate, to-wit, *the matter of the Pacific Coast Borax Company having established, continued and maintained an evil and strangling monopoly in the borax business. It is a foreign-controlled corporation,* and borax has become a material of such general use in the United States that *a monopoly thereof is oppressive in many lines of business.*
>
> * * * I think he is about as well posted as any man in the United States in regard to the borax business, and in relation to the question of the monopoly thereof by the Pacific Coast Borax Company." (R. 585, 586)

Burnham called on Glavis, taking with him the Mather letter (R. 587) and a copy of plaintiff's Amended Complaint in the Carson City action and of the affidavit filed therein in

January, 1930 (R. 597, 598). He told Glavis that "the American Potash & Chemical Company and the Pacific Coast Borax Company, had cut the price of borax in the month of June, 1928 in the very month that [his] company had started production" and that "after [plaintiff] had sold [its] borax toward the end of 1929, about November of 1929, these same companies then increased the price of borax by one-third" (R. 586).

In short, these circumstances still loomed in plaintiff's mind as proof that the price cuts were conspiratorial and designed for plaintiff's destruction. As Burnham testified, he "attached significance * * * to the fact that those price cuts occurred * * * at that time" (R. 599).

(d) Plaintiff's Letters to Secretary of Interior Ickes, 1934.

In September, 1934 plaintiff wrote a letter to Mr. Ickes, Secretary of the Interior (Def. Ex. U, R. 601) and said:

> "In the summer of 1928 this company, after overcoming many difficulties, succeeded in completing its borax plant upon its lease property and produced and sold 1427 tons of refined borax. *No sooner had we started production than a most drastic cut in price of borax occurred.* * * * This was the lowest price in the history of the borax business. Soon thereafter it was cut even more, until finally the price was reduced to $18 per ton. Our cost of production was $26 per ton, and therefore it was impossible for us to continue to operate and produce borax. * * *
>
> "The reason our competitor [i.e., P.C.B. (R. 602)] has been able to maintain this low price is because of *his illegal acquisition* in 1926 of the most valuable and most economical source of sodium borate in the world * * * known as the Kramer Borax Deposit." (R. 601)
>
> "Therefore, by illegally acquiring a source of cheap borax supply our competitor, the Pacific Coast Borax Company, have made it impossible for us to produce borax at a profit at present prices.

"It is not fair nor just that the Government should now take steps to cancel our lease upon Searles Lake due to the non-payment of our rent, or the non-production of the minerals thereon when the cause of such default is due to the *false and deceitful action of our competitor, whose main object is* to get patent to sodium borate lands and to *drive out all competition and hold a monopoly of the borax business.* Nor is it fair that the Government continue to the end that *the borax trust* can obtain continued ownership and thereby drive out of business a Government lessee, such as ourselves, who must pay a royalty on production and who obtains its lands and mineral deposits by legal and lawful methods."

* * * * * * *

"For six years we have been defending the interests of the people of the United States against the illegal practices of the borax trust. We had to carry on our battle with meager funds, whereas, the borax trust had unlimited money at its disposal." (R. 603)

In November, 1934, plaintiff wrote another letter to the Secretary of the Interior (Def. Ex. V, R. 605) and said in it:

"Immediately upon our entering into the production of borax the price of borax fell * * * below our cost of production * * * so we had to shut down.

"There are only three principal producers of borax in the world today, namely, the Pacific Coast Borax Company and the American Potash & Chemical Company, both controlled by English capital and known as the Borax Trust. In fact, they may be classed as one producer, since they both operate under English control. The West End Chemical Company at Searles Lake is the third producer. There are no other borax producers, because they have now all been bought out by the Trust." (R. 605)

(e) Plaintiff's Distrust of Defendants' Honesty, 1934-1936.

On October 11, 1934 plaintiff again consulted its attorney Townsend (R. 587) and was told that PCB in its efforts to

obtain a patent from the government on certain land in the Kramer District "had been guilty of concealing facts from the government" and that "they were not honest and above-board" (R. 588). Burnham believed this (R. 588).

In February 1936 the plaintiff consulted a Los Angeles attorney named Hess who suggested that the granting of a patent on the Little Placer to defendant United States Borax Company might be the result of fraud on the part of that defendant (R. 589, 590).

(f) Plaintiff's Communications with Senator Pittman and Accusations Against Defendants, 1936-1937.

Later in 1936 Burnham was in correspondence with Senator Key Pittman, Chairman of a Subcommittee of the United States Senate Committee on Public Lands and Surveys, investigating the potash industry. Plaintiff took some credit for having Senator Pittman introduce the resolution for the investigation (R. 739, 740). In the years 1925 to 1929 George Burnham had repeatedly talked to Senator Pittman about the fraud order (R. 764, 765), and in 1936 he told Senator Pittman about the price cuts of 1928 and their effect upon the plaintiff (R. 765, 766).

In September 1936 Senator Pittman by letter (Def. Ex. S, R. 591) requested plaintiff for a statement, and it replied on October 20, 1936 (Def. Ex. T, R. 593, 594), saying:

> "Foreign-owned corporations are practically the only producers of potash in America. They *are also the principal producers of borax and are spoken of as the English Borax Trust.* The world's potash market is controlled by the *German Potash Trust and apparently the English Borax Trust cooperates with the German Trust in the control of* the market. As soon as any Government lease begins producing potash the Trust will no doubt cut the prices of potash *and the lessees should have some kind of government protection against such competition.* A similar situation occurred when we started producing borax. *The very*

month we started on borax production, drastic cuts in the price of borax occurred." (R. 594)

* * * * * * *

"The very month we started operations saw the beginning of a price war between the two largest producers of borax (both English controlled corporations) [i.e., AP&CC and PCB (R. 595)], which drove the selling prices down to the unbelievable price of $18 per ton F.O.B. plant. * * * No producer could make profits at that price and a new company like ourselves without financial reserves could not continue indefinitely to carry the losses entailed in operation. It would almost appear that *the cut in price of borax was purposely timed to start the very month we started borax production.*" (R. 594, 595)

(g) Plaintiff Consults New York Attorney About Suing Defendants, 1938.

In 1930 plaintiff had obtained a temporary injunction in the Carson City suit against the Postmaster, but the action was dismissed for lack of prosecution in 1935 (cf. p. 41, infra). In late 1937 and early 1938 "three things occurred which revived [plaintiff's] belief as to the responsibility of these companies [defendants] for the price cut and the damage to [it]": first, the Post Office renewed enforcement of the fraud order; second, plaintiff's "lease had been terminated by the Department of the Interior", and third, "an appeal * * * to the President of the United States had been denied" (R. 609, 610).

Therefore plaintiff decided to "consult an attorney about any possible claim [it] might have against the Pacific Coast Borax and the allied companies and the American Potash & Chemical Company with respect to the damage done it as the result of the price cuts in 1928" (R. 609), and in January 1938 one of its New York stockholders suggested to Burnham that he employ Mr. William Stephens, a New York attorney, "in connection with a possible suit against these defendants American Potash & Chemical Company and Pacific Coast Borax" (R. 611). Plaintiff also contemplated having "a noted writer who is opposed to trusts" write plaintiff's history (R. 610).

On May 10, 1938, Burnham did consult Mr. Stephens (R. 611, 612) and "unburdened his troubles to him", among them being "the price cuts of 1928" (R. 613), as Burnham then believed that the price cuts of 1928 were collusive and designed to injure plaintiff (R. 614). He told Stephens "that the price cut had occurred in June 1928, at the very time [he] started production" (R. 615), and Stephens was quite "impressed" with the simultaneity and timing of the price cuts and expressed the view, "that is a remarkable coincidence * * * and it might indicate some violation of the law" (R. 615), but told Burnham that probably plaintiff was barred by the statute of limitations from suing the defendants (R. 615).

(h) Muir Monograph—"People of the United States v. Foreign-Owned Monopoly," a "History of the Burnham Chemical Co."—May 1938.

In May 1938, one of plaintiff's stockholders, Muir, prepared a monograph entitled "People of the United States vs. Foreign-Owned Monopoly" and gave it to Burnham (R. 616-617). As we have seen (p. ....., supra), in 1939 plaintiff sent a copy to Thurman Arnold calling it "really a history of the Burnham Chemical Co." This document (Def. Ex. AH, R. 662), is wholly destructive of plaintiff's claim of fraudulent concealment. It is 35 pages long, and relevant passages were read into the record (at R. 662-681). We summarize and quote portions below:—

> "Seven thousand American citizens, mostly people of small means, bought treasury stock in the Burnham Chemical Co. in the hopes of sharing in some of the profits. But the borax industry was in the control of an English-owned borax trust and a competitor would be detrimental to the trust. So it happens that every time the infant enterprise made a little progress, the monopoly, or even some Government official, would hit the struggling infant over the head and down it would fall. * * *
>
> "Now, who are they 'in and out of the halls of Government who encourage the growing restriction of competition?' Who are these people who are aiding monopoly in order that the rich can get richer and the poor get poorer?

"Let us describe some of these potash and borax deposits and recite a little of the history of this Burnham Chemical Co." (R. 662, 663)

* * * * * * *

"* * * The Pacific Coast Borax Co. sell the 20 Mule Team brand of borax, the only package borax on the market, because *the borax trust has apparently forced all others out of the field of competition.*"

The monograph then describes the placer locations on Searles Lake, "found to contain numerous deposits of borax", and states that a company was formed to develop the property, but

"The control of the company fell into the hands of another British corporation in 1909 [AP&CC's predecessor]. The principal borax production of the world is made by these two British interests [AP&CC and PCB]. Probably at the start these two companies were separate competing companies, but today *it is believed that an office in London controls the two companies.*" (R. 663, 664)

The monograph then describes the granting in 1918 of government leases on Searles Lake, some to George Burnham, and relates that Burnham was then working for PCB which put up for him the necessary bond with the Department of the Interior, but that when it appeared that his experiments would be successful, PCB discharged him and refused to finance him.

"But the making of large amounts of potash would also result in the production of large amounts of cheap borax and that would be detrimental to the borax trust. So, Mr. Burnham was discharged from the employment of the Pacific Coast Borax Company." (R. 665, 666)

The monograph continued that PCB in 1919 through a subsidiary tried to acquire large acreage at Searles Lake to utilize the process of solar evaporation.

"Thus, the Borax trust put itself on record to show that it realized the great possibilities of solar evaporation and the economies that could be effected. * * * *But apparently*

the trust reasoned 'why develop a cheap process unless it can control its use?' They reasoned that unless they had a large part of Searles Lake solar pond land they did not desire to encourage production by solar methods as it would only invite competition. Therefore, when they were denied this solar pond land as a result of the protest of Mr. Burnham, and the other lessees, the borax trust took no further steps to develop the solar process * * *. All the evidence points to a policy of the trust to either control the entire situation at Searles Lake, or else do nothing at all in hopes that no one else would do anything." (R. 666, 667)

All this, according to Muir,

"*also shows that Mr. Burnham was double-crossed. The trust wanted to use his process, but did not want to pay him anything for it.*

"Their application also indicated an attempt *to defraud the Government* of royalties from production. * * * It certainly shows the character of the Trust, as wanting to grab it all and pay the Government nothing." (R. 667)

The monograph then describes the Post Office fraud order and blames it on defendants and Stephen Mather acting as their instrument.

"The financing of the company was going along rapidly when the Post Office Department of the United States Government, apparently inspired by misinformation and evidently influenced by Stephen T. Mather, of the Department of the Interior and who was associated with the trust, imposed a Post Office Fraud Order upon the Company." (R. 668)

The document then quotes the Stephen Mather letter (see page 19, supra) and says:

"The main point about the letter is that Mr. Stephen T. Mather admits that he was responsible, in a measure, for having the fraud order issued. In other words, the president of a competing borax company, a subsidiary of

the Pacific Coast Borax Co. and a man who held a high position in the Department of the Interior admits he was in a measure responsible for having a post office fraud order issued against a competitor.

"Mr. Mather speaks of having found the literature in London. The head office of the Borax Trust is located in London. Did the head office bring the literature to his attention?" (R. 668, 669)

"Mr. Mather sets up nothing in his letter that shows there was fraud committed. He could find no fraud. *The only thing that worried him was that the Burnham Chemical Co. was a competitor to the Borax Trust with whom he was associated and their production would mean competition to his company and a loss of profits to himself.*" (R. 669, 670)

The monograph then discusses "Price Cutting of Borax". It states that despite serious crippling from the fraud order plaintiff revised its plans and managed to raise funds to complete a borax unit, which

"thus enabled the Company to begin production of borax in June 1928, just three costly years after the Fraud Order was imposed. * * * At last it looked as though the troubles of the Company were over. The borax plant was rehabilitated and completed in the spring of 1928, and in June actual production of borax was started. *But the very month the Company started operation saw the beginning of a price war between the two largest producers of borax (both English-controlled corporations)* which drove the selling prices down to the unbelievable price of $18.00 per ton F.O.B. plant. Borax had never sold for less than $60.00 a ton before and this was some $40.00 lower than borax had ever sold before in its history. No producer could make profits at that price and a new company like the Burnham Chemical Co., without financial reserves, could not continue indefinitely to carry the losses entailed in operation. It would appear that *the cut in price of borax was purposely timed to start the very month the Burnham Chemical Co. started borax production. Did the two English borax pro-*

ducers conspire to start a price war the very month the Burnham Chemical Co. started production? Were the two companies price war directed by a common management in London?" (R. 670, 671)

The monograph notes that the Burnham company obtained a temporary injunction against the Postmaster in 1930, that suit was dismissed for lack of prosecution in 1935, and that "apparently the Post Office had forgotten all about the matter" until "in September, 1937, the Fraud Order was reinstated." (R. 672) As an explanation why the fraud order was reinstated, it then describes the efforts of defendant United States Borax Company to obtain patents on borax lands in the Kramer area of Kern County, beginning in 1926, and charged that that defendant obtained its patents by fraud:

> "*Thus the evidence shows that the foreign-owned interest deceived the Government as to the nature of the deposits* and Mr. Austin was induced to withdraw this application *so that the Borax Trust could get ownership* to the deposits and thereby deprive the Government of royalties.
>
> "The Burnham Chemical Co. has contested the matter of ownership to some of the valuable sodium borate deposits in this Kramer borax district but it has been of little avail. * * *
>
> "The Government was evidently deceived as to the true nature of these deposits. * * * In my opinion, the Austin sodium applications and their withdrawal, and the prosecution of patent to the land, and the withholding of information from the Government that sodium borate was found, is *fraud,* and it is the most cunning example of *deception* practiced upon the Government in the history of land office transactions. Not only was the Government injured and consequently the People of the United States, but it enabled the Trust to grow more and wore wealthy and to cut the price of borax and drive the Burnham Chemical Co. out of business." (R. 673, 674)

The monograph then purports to describe how defendants went about acquiring "the Carlsbad potash deposits" and

charged that "apparently as a reward for assisting them," "Horace M. Albright, head of the National Parks Service of the Department of the Interior, * * * was * * * given the position of Vice-President and General Manager of the United States Potash Co. *What stronger evidence than that could one want to show* that there are people in the Halls of Government *who have been taking active efforts to help this monopoly* to get control of the potash and borax in this country?" (R. 675)

At this point the monograph quotes a letter written on July 17, 1937, by a Stockholders' Committee of plaintiff to President Roosevelt, wherein the President was told:

> "Again the Government granted ownership to the largest sodium borate deposit in the world to the *Borax Trust,* a foreign-owned concern, contrary to the law and the intention of Congress *giving the trust a strangle hold on the borax industry and enabling them to drive us out of the competitive field, at the time we started our production."* (R. 676)

The Muir monograph concluded that the reason for the reinstatement of the postal fraud order in 1937 was that defendants utilized someone in government service to bring it about in order to punish plaintiff for its opposition to defendants' acquisitions in Kern County. *Plaintiff was fully convinced of this fact,* for the monograph continued with an essay on "Evidence by Induction", saying:

> "Through inductive evidence one can reason that when foreign-owned companies get all the breaks and yet 7000 American citizens get all the knocks there must be some one in the Halls of Government that is helping the foreign-owned interests and deliberately blocking the efforts of 7000 American citizens.
>
> * * * * * * *
>
> "What stronger evidence would one want to show that the British Borax Trust itself was behind the various steps that have been taken to defeat the Burnham Chemical Co.

and that it used the Government as a tool to accomplish it; that it induced the Post Office to issue a Fraud Order against the Burnham Chemical Company in order to eliminate a competitor, when Stephen T. Mather, a member of the Borax Trust, admits that he was, in a measure, responsible for the Fraud Order?

* * * * * * *

"* * * it is inconceivable that our Post Office Department would issue a Fraud Order against the corporation and destroy the investment of 7000 stockholders without first asking the corporation to change any statement the Government thought was incorrect. A fair-minded Government would not do such a thing and *therefore it must have been the Borax Trust behind the Fraud Order, just as Stephen T. Mather's letter shows.*" (R. 678-680)

(i) Plaintiff's Repeated Accusations Against Defendants to Government Officials—1939.

In August 1939 Burnham again went east, taking with him copies of the Mather letter, Townsend's letter of 1928 and the Muir monograph (R. 616), because he thought them to be important (R. 648).

Burnham again conferred with his attorney, Mr. Stephens, in New York (R. 617) and called on Mr. Wendell Berge of the Antitrust Division of the Department of Justice. In November, as we have seen, he wrote to Thurman Arnold. Burnham admitted that this letter stated substantially what he had earlier told Berge (R. 623, 625), and that what he had told Mr. Berge he had already told Senator Key Pittman in 1936 and 1937 (R. 624, 625). Thus, the Thurman Arnold letter (quoted at pages 9-11, supra) summarizes plaintiff's accusations made to Senator Pittman in 1936.

In November and December 1939 and January 1940 plaintiff wrote other letters that are significant because they demonstrate plaintiff's positive conviction that the 1928 price cuts could not be explained by increased production of borax or the discovery

of new and cheaper sources of supply or methods of production, but only by conspiracy of defendants aimed at plaintiff. On November 18, 1939, plaintiff wrote to the Secretary of the Interior (Def. Ex. H, R. 484), from which we have already quoted passages (p. 20, supra). This letter also said:

> "As President and Stockholder of the Burnham Chemical Company and as a citizen of the United States I protest the granting of any further potash lands, through lease or otherwise, to the American Potash & Chemical Company * * *. The reasons for my protest are as follows:
>
> "(1) The American Potash & Chemical Corporation and other fertilizer producers are now being investigated by the Antitrust Division of the Department of Justice for alleged violation of the Sherman Antitrust Laws This corporation is a foreign-owned Company with about 80 per cent of its stock held by foreign citizens residing in England. *The corporation, together with another British-owned potash and borax producer in the United States* [i.e., PCB, (R. 619)] *constitute a formidable monopoly of the potash and borax industry of this country."* (R. 618, 619)
>
> * * * * * * *
>
> "The Burnham Chemical Company was granted a lease on lands at Searles Lake. * * * It proceeded with the development of its lease by raising money through the mails. * * * the Post Office issued a fraud order against the Company, in 1925, denying it the use of the mails. Our supply of funds, the lifeblood of the Company, was cut off. * * * However, the Company did manage to raise sufficient money to build part of its plant and produce borax; and 1,400 tons of 99½ per cent pure borax was produced. But, the very month our production started, in June, 1928, the American Potash & Chemical Corporation and the Pacific Coast Borax Company, both foreign-owned companies, began cutting the price of borax from approximately $60 per ton f.o.b. Searles Lake to about $18 a ton. Our cost of production was $26 per ton, so, when the price fell below $26 we were losing money—and we

had to close down our plant. After we stopped our small production the price went up. * * * we were unable to pay even the rent on the lease, and, therefore, the Department of the Interior cancelled our potash lease.

"* * * It is evident that the foreign-owned borax interests realized that if the solar methods of production got an adequate start they could become serious competitors to themselves; it would break the British Monopoly of the potash and borax industry in this country; and so this drastic cut in the price of borax was aimed at us, to drive the cheaper methods of production from the field. The new source of borax in the Kramer Borax fields was the excuse of the Borax Trust for cutting the price of borax, but that field had been in production for a year before we started production. Furthermore, after we stopped our small production, the price went up. * * * Foreign interests drove us out." (R. 618-621)

Plaintiff knew in 1928 that the Kramer borax fields had been in production a year before plaintiff started production and that AP&CC's Searles Lake production had already doubled in 1927 (R. 647). The significance of these facts had *always been with* it as showing that the new Kramer field could not be the real reason for the price cuts (R. 622).

The letter also referred to the Carlsbad Potash Leases and Mr. Horace M. Albright's employment (cf. Muir Monograph, pp. 41, 42, supra), and asserted:

> "This incident shows a further connection between foreign-owned interests and Government officials *which lead us to believe the foreign-owned interests have more than once used their influence in the Halls of Government to drive out American competition* * * *." (R. 623)

On December 8, 1939, Mr. Pearce, Special Assistant to the Attorney General in charge of antitrust matters in New York City, by letter asked plaintiff for "any documentary evidence which you may have in your possession sustaining the views ex-

pressed" in the letter to Thurman Arnold (Def. Ex. W, R. 631). On December 18, 1939, the plaintiff replied (Def. Ex. X, R. 632):

> "I do not know just what documentary evidence you desire, but in case you want to know the prices to which borax was cut in 1928 this information can be obtained from * * * the Secretary-Treasurer of the Burnham Chemical Co. * * *
>
> "In case you desire to see the letter of Oct. 8, 1926, from Mr. Stephen T. Mather to Mr. Whitney, that is in the possession of Mr. Whitney * * *.
>
> "* * * we could have made a substantial profit if the price of borax had remained up. *The very month we started production in June, 1928, the price war on borax started.* Our borax was 99½% pure and was made by the solar evaporation of the Searles Lake brine. We required no expensive fuel oil to evaporate the brine as do the American Potash & Chemical Co. But our process was patented and they did not want us to succeed; so they started the price war." (R. 632-634)

What plaintiff here wrote to Mr. Pearce it had already told Mr. Berge (R. 635) and to Senator Key Pittman in 1936 and 1937.

On January 5, 1940, plaintiff again wrote to Mr. Pearce (Def. Ex. Y, R. 636) and emphasized:

> "The price cutting on borax, mentioned in my December 18, 1939, letter to you occurred in June, 1928. The price cutting drove the Burnham Chemical Co. out of business and prevented us from building up a plant to produce potash, borax and other chemicals at Searles Lake, California * * *.
>
> "* * * *In other words, the price of borax was cut in half at the plant the very month we started production.* About three months later it was down to about $18.00 per ton f.o.b. plant.
>
> "On page 389 of the June, 1928, issue of Chemical and Metallurgical Engineering Magazine, the following statement is made:

'Among important price changes in market for chemicals during the past month was a drastic decline in quotations for borax and boric acid. Improved processes by which production costs have been lowered is given as the reason underlying the price change.'

"The statement that improved processes caused the price reduction does not entirely fit into the facts. The newly discovered borax deposits in the Kramer Borax District, California, in 1925 no doubt has had some influence on the price of borax, but the Kramer field was producing borax for about a year and a half before we started production. The processes at Kramer and Searles Lake were fairly well established. *Yet the very month we started production they cut the price in half.* If the processes were being improved you would expect a more gradual lowering of price. I will be glad to go into this in more detail with your representative when he calls." (R. 637, 638)

In January 1940 Burnham conferred with the Department of Justice in San Francisco, and on January 30, 1940, wrote to it (Def. Ex. Z, R. 639), emphasizing:

"As mentioned in my letter of January 5, 1940, to Mr. Charles C. Pearce of your New York office, the price of borax dropped * * * in June 1928. The enclosed photostat copies of pages in the 'Chemical and Metallurgical Engineering' magazine for June, 1928, show a drastic cut in price for borax for that month compared to the previous month.* * * *That was the very month we started our borax production, June, 1928. We continued our production until January, 1929, and we were then forced to shut down due to price cutting. From stocks of borax on hand we continued to sell borax until the fall of 1929. During this period the price of borax continued to fall still more.*

* * * * * * *

"By the fall of 1929 all the borax stored in our warehouse was sold. We were shut down and without funds to renew operation because we had been forced to sell borax below cost of production. So in November, 1929, since we had been forced out of business, the market price of borax went up. * * *

"As long as we threatened renewal of our production or had stocks of borax on hand, the price stayed down, but when all our borax was sold and we were eliminated as a competitor the price went up. *We were a potential producer of potash and therefore when we were eliminated as a borax producer* we were also eliminated as a future potash producer.

"*Another interesting point to consider is that this price increase took place in November, 1929. Yet about two months prior to that time the financial crash of 1929 had started.* The world-wide depression had begun with tumbling stock market prices. In spite of the fact that one of the biggest depressions in history was upon the world, the Trust raised the price of its borax. That is further evidence that the rise in price was because we were eliminated as a competitor." (R. 639-641)

The fact that the price had risen just as soon as plaintiff had sold all its borax was known to it ever since it occurred in 1929 (R. 642), and plaintiff had "realized long before 1939 that the fact might have a peculiar significance" (R. 648, 649).

On January 13, 1940, plaintiff wrote to its stockholders (Def. Ex. AG, R. 654) and said:

"Last August I wrote you about the Burnham Chemical Co. I mentioned a hearing in Washington, D. C., on September 12, 1939, which I planned to attend. I attended the hearing and I am convinced that the Government is beginning to take our view regarding the disposition of certain valuable borax deposits in the Kramer Borax District, California.

"*For some time I have talked about the British-owned potash and borax interests getting most of the potash and borax deposits in this country and driving out American competition. Well! Now the United States Department of Justice is investigating the potash producers of this country for their alleged violation of the Sherman Anti-Trust laws.*"

In this statement that "for some time" he had been talking about the British-owned borax interests getting the borax deposits in this country and driving out American competition, Burnham referred to "the whole period of the time when we were driven out of production * * * since 1929."

5. PLAINTIFF'S DELAY IN SUING WAS DUE TO LACK OF FUNDS.

The simple fact is that plaintiff's long delay in filing suit was due to lack of funds. Thus, although it had filed its suit against the Postmaster in 1925 and its Amended Complaint in 1926, it did not bring its application for temporary injunction to hearing until 1930, primarily for lack of funds (R. 657). Similarly, although it was convinced that it had a good patent infringement claim against AP&CC and served notice of infringement, it never filed suit because of lack of funds (R. 658, 659).

In the letter to Thurman Arnold in November, 1939, plaintiff stated that it had been advised by its attorney Townsend in 1928 and was convinced that it had a good case against the defendants for violation of the antitrust laws but it had no funds to proceed (see p. 10, supra). And Burnham testified:

> "Q. Why was it, Mr. Burnham, that the plaintiff, Burnham Chemical Company, was unable to employ Mr. Townsend or Mr. Heney to continue the investigation in search for evidence to support your charge after 1929?
>
> "A. Because we were practically broke and what money we did have was sent to us by our stockholders for other purposes." (R. 660, 661)

The "charge" here referred to is "the charge of conspiracy in violation of the antitrust laws", "the charge that these defendants had injured [plaintiff] in violation of the Anti-Trust Laws" (R. 661).

6. DEATH OF WITNESSES AND PARTIES.

In the many years elapsing before this action was brought, numerous witnesses who might challenge Burnham's claims have

died. Mr. Stephen Mather, Judge Heney, B. D. Townsend, R. C. Baker (president of the PCB group and the man in charge of it, R. 537), Senator Pittman, Mr. Whitney—all are dead (R. 659). Zabriskie died in the early 1930's (R. 537).

APPELLEES' CONTENTIONS

Appellees contend

(1) that on the face of the complaint the action is barred by the statute of limitations, and

(2) that under the evidence it is indisputably so barred.

DISCUSSION

I.

The Applicable Statute of Limitations Is Section 338, Subdivision 1, California Code of Civil Procedure; the Period Is Three Years; and the Statute Begins to Run as to Any Item of Damage From the Overt Act Producing It.

A. THE STATE STATUTE OF LIMITATIONS APPLIES.

The state statute of limitations applies to treble damage suits by private parties under the federal antitrust laws.

Chattanooga Foundry and Pipe Works v. City of Atlanta, 203 U.S. 390;

Foster & Kleiser Co. v. Special Site Sign Co., 85 F.2d 742 (9 Cir.), cer. den. 299 U.S. 613,

and numerous other cases cited below.

An Action to Recover Treble Damages Under the Antitrust Laws Is an Action at Law, Not a Suit in Equity

Appellant urges on this Court a contention never made in the District Court. It argues that this is a suit in equity, and since, under *Holmberg v. Armbrecht,* 327 U.S. 392, no statute

of limitations applies to suits in equity in federal courts, appellant argues that no statute of limitations applies to this case.

But a treble damage suit under the antitrust laws is not a suit in equity. It is an action at law, and a tort action. This is not only the necessary implication of all antitrust cases involving the statute of limitations wherein it has been universally held that the state statutes govern, but it has been held expressly. In *Fleitmann v. Welsbach Co.,* 240 U.S. 27, involving a bill by a stockholder of a corporation against defendants to compel payment of treble damages under the Sherman Act, the court held that the action was not in equity but at law. The court, through Mr. Justice Holmes, said (pp. 28, 29):

> "Of course the claim set up is that of the corporation alone, and if the corporation were proceeding directly under the statute no one can doubt that its only remedy would be at law. * * *
>
> "* * * we agree with the courts below that when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law. On the contrary it plainly provides the latter remedy and it provides no other."

To the same effect, *Meeker v. Lehigh Valley Railroad Co.,* 162 Fed. 354:—"This is an action at law, * * *" (p. 357). And so also in *Hartford-Empire Co. v. Glenshaw Glass Co.,* 3 F.R.D. 50, where it is said: "It has been held by the United States Supreme Court that an action for damages for violation of the antitrust laws is an action at law triable by a jury as of right."

In *Connecticut Importing Co. v. Frankfort Distilleries,* 101 F.2d 79, 87 (2 Cir.), the court said: "This is not a suit in equity * * *," and several courts have had occasion to state the obvious, that the action is in tort. *Clark Oil Co. v. Phillips Petroleum Co.,* 148 F.2d 580, 583 (8 Cir.); *Northwestern Oil Co. v. Socony-Vacuum Oil Co.,* 138 F.2d 967, 970 (7 Cir.)

Holmberg v. Armbrecht, supra, itself recognizes that the action

is at law. At page 37 of its brief, plaintiff quotes from that case as follows:

> "Apart from penal enactments, Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications. As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitations *(citing cases).*"

Significantly, in quoting this passage, plaintiff omits the citations substituting the phrase "citing cases", but one of the citations so omitted by plaintiff is *Chattanooga Foundry etc. v. Atlanta,* 203 U.S. 390, a treble damage suit under the Sherman Act, in which the court held that the state statute of limitations applied.

The apparent basis of plaintiff's contention that this is a suit in equity is (Brief, pp. 22, 39) that somehow fraud is involved. Even were fraud involved, that would not make a case a suit in equity; e.g., an action for damages for fraud is an action at law. Moreover, an action for damages under the Sherman Act is not an action for fraud at all, and where "fraudulent concealment" is urged as tolling the running of the statute of limitations, fraud is not the gravamen of the action and is no part of the cause of action. *Foster & Kleiser Co. v. Special Site Sign Co.,* supra; *State of Oklahoma v. American Book Company,* 144 F.2d 585 (10 Cir.).

The plaintiff seems to suggest that the *Holmberg* case was a suit in equity because fraudulent concealment was involved. Such is not the fact. That was a suit by creditors of an insolvent Land Bank under Section 16 of the Federal Farm Loan Act to enforce stockholders' liability for the bank's debts. Such a proceeding is a suit in equity because, as said in *Russell v. Todd,* 309 U.S. 280 at 285:

> "As the liability of the stockholders as prescribed by this section is to pay 'equally and ratably,' the sole remedy is by plenary representative suit brought in equity in behalf

of all creditors of the bank, in which the existence and extent of insolvency, and the ratable shares of the contribution by shareholders can be ascertained and an equitable distribution made of the fund recovered."[10]

The Farm Loan Act, unlike the National Bank Act, confers no power on the receiver to levy an assessment or to sue to enforce statutory liability (*Wheeler v. Greene,* 280 U.S. 49), and therefore the only mode of enforcement of the liability is a creditor's bill in equity. *Christopher v. Brusselback,* 302 U.S. 500 at 502.[11]

Plaintiff's Contention Is Inconsistent with Its Position Below

Plaintiff's present contention was never even suggested in the court below. Plaintiff admitted below that the state statute of limitations applied. Thus at the pre-trial conference of December 2, 1946, plaintiff's counsel said:

> "We are suing under Section 15, the treble damage section * * *. *There is no question but what on the bare statement of all the facts, the statute would have run unless we did allege and prove some excusatory facts.* [R. 300, 301]
>
> * * * * * * *

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10. The passage quoted continued thus:
"But this amount cannot be determined and its distribution effected with resort to the procedures traditionally employed by equity upon a bill for an accounting and for the distribution of a fund brought into its custody. No stockholder is liable for more than his proportion of the debts not exceeding the par value of his stock. His proportion can be ascertained only upon an accounting of the debts and of the stock and a pro rata distribution of the liability among the shareholders and of the proceeds of recovery among the creditors. Such a suit during its progress and at its conclusion by a final decree of distribution requires the exercise of powers which are peculiarly those of a court of equity to bring before it in a single suit all the necessary parties to ascertain their rights and liabilities, and to adjust and settle them by its decrees."

11. The only other case cited by plaintiff to support its contention that this is a suit in equity is *Benedict v. City of New York,* 250 U.S. 321, which was, however, a suit on an express trust.

"* * * what we believe, your Honor, is this, that the matter stands, *and it is our position that unless we can make good our excusatory allegations, of course, the statute will have run* * * *." (R. 302)

Again, at the pre-trial conference of January 16, 1947, the following colloquy occurred between court and counsel for plaintiff (R. 266, 267):

"The Court: There is another question also that I think would have to be decided, and that is, who would go forward to present the evidence first on this issue? * * * There must be a preponderance of evidence, according to all rules, to be borne by him who has the burden of proof. I will be glad to decide that unless you gentlemen can agree between yourselves as to that.

"Mr. Carr: *I think we should, because we are advancing facts which we claim tolled the statute of limitations, and I think that burden does rest with us.*" (R. 266, 267)

Plaintiff's counsel also said at the same time (R. 306):

"Our only defense to the statute of limitations is the excusatory allegations which we have in our complaint and coming under those California cases of fraud and concealment."

Furthermore, as we have already noted, it was the plaintiff which suggested to the District Court that it order a separate trial on the statute of limitations (p. 5, supra), and it was the plaintiff which demanded a jury trial (p. 6, supra), and a jury trial was granted because, the action being at law, plaintiff was thought to be entitled to a jury as of right.[12]

B. THE APPLICABLE STATUTE IS C.C.P. SECTION 338, SUBDIVISION 1, AND THE PERIOD IS THREE YEARS.

The action is one upon a liability created by statute other than for a penalty or forfeiture.

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12. As said by the trial court:
"You have requested a jury trial in this case, which is your right, as to this special issue, and you have it." (R. 448)
"The Court: But, Mr. Carr, you demanded a jury, if I remember rightly, to hear this factual question as to whether the cause of action was barred by the statute of limitations." (R. 812)

Foster & Kleiser Co. v. Special Site Sign Co., 85 F.2d 742 (9 Cir.);
Momand v. Universal Film Exchange, 43 F.Supp. 996;
Hansen Packing Co. v. Swift and Co., 27 F.Supp. 364.

Consequently, as this Court held in the *Foster & Kleiser* case, the applicable statute in California is Section 338, Subd. (1) of the *California Code of Civil Procedure:*—"Within three years: 1. An action upon a liability created by statute, other than a penalty or forfeiture."

C. THE STATUTE BEGINS TO RUN SEPARATELY AGAINST EACH ITEM OF DAMAGE AND NOT LATER THAN THE DAMAGE ITSELF OR FROM THE OVERT ACT PRODUCING THAT DAMAGE. THE THEORY OF CONTINUING CONSPIRACY HAS NO APPLICATION TO A PRIVATE SUIT FOR DAMAGES.

Plaintiff argues that its action is one for conspiracy and that the statute of limitations does not begin to run as long as the alleged conspiracy continues or some overt act occurs, even though that act has no relation to the plaintiff or caused no damage to it. In this the plaintiff errs and is confused in trying to import into a private damage suit the rule applicable to criminal prosecutions for violations of the antitrust laws.

In a criminal case, so long as there is a conspiracy within the period of limitations, there is a punishable crime. But a treble damage suit by a private party is not brought to vindicate the law. The gravamen of such an action is not the conspiracy—the wrong to the public—but the damage suffered by the plaintiff. Therefore there must be overt acts, for without overt acts there can be no damage, and, although the overt acts may acquire the taint of illegality because of the conspiracy, the private plaintiff's right to recover is based on the acts done *to his damage.*

Plaintiff's principal reliance in its continuing conspiracy theory is the case of *United States v. Kissel,* 218 U.S. 601. But that was a criminal case, and all the other cases cited by plaintiff in its

brief on the subject are likewise criminal cases. This Court in the *Foster & Kleiser* case, supra, expressly held the *Kissel* case inapplicable to a treble damage suit. The United States Supreme Court denied certiorari (299 U.S. 613), and the *Foster & Kleiser* decision has been repeatedly approved by every court which subsequently has had to apply the statute of limitations to private suits under the Sherman Act.

In the *Foster & Kleiser* case, this Court held (pp. 750, 751) that "The fact that there may be a criminal conspiracy does not give plaintiff an action for damages"; the right of action, unlike in a suit by the government, criminal or civil, lies not in the conspiracy but in injury to the particular plaintiff resulting from particular overt acts. This Court further said (p. 750):

> "In a civil action for damages sustained because of a conspiracy in restraint of trade, the right of recovery is not based upon the conspiracy, but upon the injuries resulting therefrom. * * * The gist of the action under this section is for injuries inflicted pursuant to the conspiracy for which the wrongdoer is liable. Morris & Co. v. Nat'l Ass'n of Stationers (C.C.A.) 40 F.(2d) 620. *The cause of action arises when the damage is sustained and the statute of limitations begins to run at that time.* Bluefields S. S. Co. v. United Fruit Co. (C.C.A.) 243 F.1, 20. * * *
>
> "Under this decision, in a civil action for damages under the Sherman Anti-Trust Act, a plaintiff may recover only such damages as have been sustained within the applicable period of limitations immediately preceding the filing of the action."

The statute runs from the date the damage was incurred (*Bluefields S. S. Co. v. United Fruit Co.*, 243 Fed. 1); indeed, the statute runs as to each item of damage from the date of the last overt act causing that damage to the plaintiff; if there are more than one overt act causing damage, the statute runs on each separately. See thorough discussion in *Momand v. Universal Film Exchange, Inc.*, 43 F. Supp. 996 at 1006, et seq.; also *Glenn Coal Co. v. Dickinson Fuel Co.*, 72 F.2d 885 at 888

(first col.) and 890 (4 Cir.); *Momand v. Paramount Pictures Dist. Co.,* 36 F. Supp. 568; and *Strout v. United Shoe Machinery Co.,* 208 Fed. 646, at 650 (cited in the *Foster & Kleiser* case).

In *Momand v. Universal Film Exchange, Inc.,* 43 F. Supp. 996, Judge Charles Wyzanski carefully stated the law on the subject in a decision rendered by him after special trial on the statute of limitations. He said (at p. 1006):

> "Under the law of the United States private causes of action for damage suffered from violations of the anti-trust law may accrue at different times, depending upon the type of violation. * * * In the single violation type of case, the moment the plaintiff's interest is invaded he is entitled to sue for damages not only on account of the injuries he suffered at once but also on account of those he will suffer in the future from the defendant's wrong, including what he has suffered during, and will suffer after, the trial. * * *
>
> "* * * Each time the plaintiff's interest is invaded by an act of the defendants, he has a new cause of action. For that particular invasion he is at once entitled to recover as damages, not only for the injuries he suffers at once, but also for those he will suffer in the future from that particular invasion, including what he has suffered during and will suffer after the trial. * * *
>
> "When those new invasions occur, new causes of action will accrue and a new period of limitation applicable to the damage from those invasions will begin. * * *
>
> "It is not difficult to apply the foregoing principles to this case. As I have said, the plaintiff here alleges first, that the conspiracy continued up to the date of the writ, and second, that the plaintiff's interests have been invaded at different times. The first allegation is not controlling. *Even though 'a conspiracy * * * is in effect renewed during each day of its continuance'* (United States v. Borden Co., 308 U.S. 188, 202, 60 S. Ct. 182, 190, 84 L. Ed. 181), *no private civil cause of action accrues from the mere conspiracy itself because standing alone a conspiracy does not*

invade any private rights. Nalle v. Oyster, 230 U.S. 165, 182, 183, 33 S. Ct. 1043, 57 L. Ed. 1439; *Foster & Kleiser Co. v. Special Site Sign Co.,* 9 Cir., 85 F. 2d 742, 751. *Thus, in private suits the existence of the conspiracy as such is not the critical question in computing the period of limitation.* Northern Kentucky Telephone Co. v. Southern Bell Telephone & Telegraph Co., 6 Cir., 73 F. 2d 333. See, also, the cases collated in Note 97 A.L.R. 137. The critical question is on what date or dates the defendants invaded the plaintiff's interest. Cf. American Law Institute, Restatement of Torts, vol. IV, § 899, pp. 523-529. In the case from the Sixth Circuit just cited, it is said that the question is on what date the defendant last acted, which is perhaps another way of stating the same rule."

In *Beegle v. Thomson,* 138 F.2d 875, 881 (7 Cir.) (per Lindley, J.), the court said:

"Section 15, allowing private parties treble damages for injury accruing to their business from violation of the Anti-Trust Act, embraces, as one of the essentials to such action, injury to plaintiff's business. The complaint must affirmatively show this injury. It is not enough to allege something forbidden and claim damages resulting therefrom. Allegation of the specific injury suffered by plaintiff differing from that sustained by it as a member of the community is essential. * * * The mere existence of a violation is not sufficient ipso facto to support the action, for no party may properly seek to secure something from another without allegation and proof of facts demonstrating pecuniary loss springing from or consequent upon the unlawful act."

In *Glenn Coal Co. v. Dickinson Fuel Co.,* 72 F.2d 885 (4 Cir.), the court considered the problem pertinently thus (p. 888):

"In this case we must, therefore, carefully analyze the declaration to ascertain what act or acts of the defendants are alleged which amount to a violation of the law with

consequent damage to the plaintiff. It is alleged in the declaration with much emphasis and repetition that the defendants unlawfully combined and conspired to violate the law, and to restrain and monopolize the trade and also that their acts were unlawful, fraudulent, deceptive and accompanied by the intent to violate the law. These are, however, only general allegations and in themselves no more than conclusions of the pleader in the absence of averment of specific acts of the defendants from which it can be determined as a matter of law whether the Act has in fact been violated with resultant damage to the plaintiff. Here we find that only two specific acts are set out consisting of (1) defendants' activities with respect to the allegedly deceitfully procured exclusive sales agency taken by the Dickinson Fuel Company from the plaintiff * * *. As to the former, it appears its duration was limited to the period * * * [which] terminated more than 8 years prior to the commencement of the suit. * * * This allegation may, therefore, be dismissed from further consideration."

See, also, *Sidney Morris & Co. v. National Association of Stationers,* 40 F.2d 620 (7 Cir.); *Alexander Milburn Co. v. Union Carbide & Carbon Corp.,* 15 F.2d 678, 680 (4 Cir.); *Midwest Theatres Co. v. Cooperative Theatres,* 43 F. Supp. 216, 220; *Leonard v. Socony Vacuum Oil Co.,* 42 F. Supp. 369, 370; *Twin Ports Oil Co. v. Pure Oil Co.,* 119 F.2d 747 (8 Cir.), cer. den. 314 U.S. 644; *Twin Ports Oil Co. v. Pure Oil Co.,* 46 F. Supp. 149, 152.

D. PLAINTIFF'S CAUSES OF ACTION ACCRUED NO LATER THAN JANUARY 1929.

As we have seen (pp. 2-4, supra), the plaintiff's causes of action are predicated on damage allegedly suffered from two events, *and two only,* (a) the post office fraud order in 1924 and 1925, and (b) the price cuts of 1928. Since damage was at once suffered, the statute then began to run. Moreover, the

damage was then complete, because plaintiff was completely out of business by January 1929 (see p. 3, supra).[13]

In an attempt to escape the only overt acts in the case, plaintiff's brief asserts (p. 7) that its cause of action "is based upon a conspiracy formed by the defendants in the fall of 1929." Not only is that legally impossible (see pp. 55 to 59, supra), but an inspection of the complaint does not support the assertion. The first seventy-one paragraphs (R. 2-39) make general allegations about conspiracy *without any relation to the plaintiff* and state no cause of action in any private party. The cause of action, if any, must be found in what follows under the topic heading "As to Plaintiff" (R. 40).

Indeed, if plaintiff's contention that its cause of action "is based upon a conspiracy formed by defendants in the fall of 1929" were correct, it would have no cause of action at all because no overt acts were committed to its damage after January 1929. And by the time the alleged conspiracy in the fall of 1929 was formed the plaintiff no longer had any business to be damaged. In other words, nothing was done to plaintiff's damage under the alleged conspiracy, and the prior acts which allegedly caused its damage were not done under any conspiracy of which the plaintiff complains and therefore could not be actionable.

As a matter of fact, it is not true that the conspiracy on which the plaintiff has sued is alleged to have been formed in the fall of 1929. While the complaint does allege that the defendants entered into an agreement in the fall of 1929, it also alleges, in paragraph 66 (R. 36) that

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13. Even had some damage continued to flow—contrary to the fact—the running of the statute would not have been deferred, for as said in *Northern Kentucky Telephone Co. v. Southern Bell Telephone & Telegraph Co.*, 73 F.2d 333 (6 Cir.):

> "If this were not true, then it would result that, in every case where damages resulting from a wrongful act are in their nature continuing, there would be no limitation upon the right of action, and the beneficent purpose of the statute to put a period to the right to sue would be defeated." (p. 335)

"said 1929 agreement constituted a reduction to writing of the previous verbal and written agreements, understandings, combinations and conspiracies of defendants and, from time to time, made and entered into by said defendants during the years previous to the making and entering into of said agreement of 1929."

Little Placer

Plaintiff's brief refers to the allegations (R. 48-53) relative to the Little Placer claim as constituting the "last overt act." The gist of these allegations is that in 1925 certain sodium borate deposits were discovered in Kern County; that some of the defendants acquired patents from the government on all but a 10-acre plat known as the Little Placer; that the plaintiff since 1928 has sought to obtain a lease on the Little Placer from the United States Government under the Sodium Leasing Act; that some of the defendants opposed the application and sought to obtain a patent from the government under the Mineral Laws; that the Department of the Interior has declined to give the plaintiff a prospecting permit or a lease and has declined to give the defendants a patent, and that the Little Placer still belongs to the United States Government, the latter having refused either to lease or patent it to anyone.

Three things are at once obvious:

1. If Any Claim to Damages Re the Little Placer Existed, It Would Be Barred by the Statute of Limitations.

The complaint alleges that plaintiff's application to the Department of the Interior for a prospecting permit was denied on February 9, 1929 (R. 50), and that its application for a lease was denied finally on May 3, 1933 (R. 50). What happened thereafter were merely unsuccessful attempts of plaintiff to induce the Department to reopen and reconsider and of defendant United States Borax Company to obtain a patent.

2. But No Cause of Action With Respect to the Little Placer Is Alleged, Because No Damage Is Claimed Therefrom.

The damage claimed in the complaint is the sum of $1,168,564 (para. 81, R. 53), and this is the exact sum which plaintiff alleges that it had invested in developing its brine borax plant at Searles Lake in San Bernardino County (para. 73, R. 45). The Little Placer in Kern County is a mining deposit of ore and not part of the Searles Lake works, and there is thus no allegation of damages with respect to the Little Placer. This fact, apparent on the face of the complaint, was also frankly conceded by plaintiff's counsel, as we have seen at p. 4, supra.

The Little Placer allegations were inserted in the complaint solely under the erroneous theory that so long as the continuance of a "conspiracy" can be evidenced by some overt act, even though it causes no damage, the statute does not begin to run against damages resulting from earlier overt acts.

3. No Cause of Action Relative to the Little Placer Is Alleged, Even Had Damages Been Suffered.

Even if plaintiff had suffered damage from failure to receive a lease on the Little Placer, it would be a case of *damnum absque injuria.*

The decision whether the property was subject to patent under the mining laws or to the leasing acts, and, if the latter, whether to grant a prospecting permit or a lease, or to refuse to grant either, was vested by law in the Department of the Interior (30 *U.S.C.A.* Sec. 181, 182, 261, 262; *Oregon Basin Oil & Gas Co. v. Work, Sec. of Interior,* 273 U.S. 660, affirming 6 F.2d 676; *United States v. Wilbur,* 283 U.S. 414). The proximate cause of the plaintiff's failure to obtain a lease was the determination of the United States Government, acting through that Department. If the latter acted improperly, the plaintiff may have had a right to go to the courts in a direct attack, but it may not collaterally attack the determination of the Land Office,

nor could the District Court in this case substitute its judgment for that of the Secretary of the Interior and say that the plaintiff was entitled to a lease.

The principle in the field of malicious prosecution is wholly analogous (16 Cal. Jur. 734), that an action may not be maintained unless it appear that the alleged malicious prosecution has been terminated in favor of the party injured by it. This rule "is founded upon the necessity that proceedings in a court properly vested with jurisdiction of the parties and the subject matter shall be free from collateral attack."

A complaint states no cause of action for damages under the Sherman Act where the damages result from acts of governmental officials although "instigated and induced by the defendant". *American Banana Company v. United Fruit Company,* 166 Fed. 261, affirmed *American Banana Co. v. United Fruit Co.,* 213 U.S. 347 (per Mr. Justice Holmes), where it is said (at p. 358):

> "The fundamental reason why persuading a sovereign power to do this or that cannot be a tort is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. * * * It makes the persuasion lawful by its own act."[14]

In *Keogh v. Chicago and Northwestern Railroad Co.,* 260 U.S. 156, the plaintiff sued under the Sherman Act for treble damages because defendant railroads had, in conspiracy, fixed rates; he was denied damages because the rates had been approved by the Interstate Commerce Commission. The court (per Mr. Justice Brandeis) agreed that, if the railroads had fixed the rates by agreement and conspiracy, they were subject to criminal prosecution or to an equity suit *by the government*

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14. Even though the activity of private parties would otherwise be illegal as in violation of the antitrust laws, they may not be held liable for bringing matters before the governmental official or body, state or federal, having jurisdiction or for action taken by those governmental authorities within the scope of their legal powers. *Washington Brewers Institute v. United States,* 137 F. 2d 964 (9 Cir.).

under the Sherman Act, even though the rates had been approved by the Commission, but a private plaintiff could recover no damages because the approval of the rates by the Commission conclusively established that he had paid rates no higher than he had a legal right to pay. As the court said:

> "Section 7 of the Anti-Trust Act gives a right of action to one who has been 'injured in his business or property.' *Injury implies violation of a legal right.*"

And see *Maltz v. Sax,* et al., 134 F.2d 2 (7 Cir.), cer. den. 319 U.S. 772, where a plaintiff was held to have no cause of action for damages from a conspiracy under the antitrust laws which injured him in his business of the manufacture and sale of punchboards, because punchboards are a gambling device and therefore against public policy, and therefore he had been damaged in no legal right.

In the present case, denial by the Department of the Interior of plaintiff's application for a lease was conclusive that the plaintiff had no legal right to a lease. It would be rank conjecture to speculate that had the defendants not attempted to obtain a patent on the Little Placer, the plaintiff would have been successful in obtaining a lease. And the Department has itself stated just that. There are in evidence here (R. 819) certified copies of (1) a decision of the Department of the Interior dated January 22, 1947,[15] denying the plaintiff's renewed application for a lease, (2) order of the Department dated February 24, 1947, denying the plaintiff's motion for a rehearing. The first document states that plaintiff's application for a prospecting permit was finally rejected November 23, 1928; that plaintiff did not appeal from that rejection, and that "the Commissioner * * * *finally rejected* the application for a lease on May 3, 1933, and *closed the case.*" It then recites the proceedings between the United States Borax Company and the Land Office, to which plaintiff here "was not a party and did not participate". It

15. The transcript erroneously describes this as July 22, 1927.

states that after the United States Borax Company relinquished all claims to the Little Placer in 1945 the Burnham company pressed an application for reinstatement of its lease application. After noting the contention of the Burnham company

> "that it should be granted a lease as a matter of equity because a foreign borax combine was working against it from 1928 on" and "that the combine could have colored the picture as to the Little Placer during the first hearing"

it states that Burnham did not and could not contend that it was entitled to a lease as a matter of law, and it continues:

> "Appellant's claim therefore comes down to the contention that it should be granted reinstatement and a lease because of equitable considerations. On this score, appellant avers that it would have been granted a lease without competitive bidding in 1933 had the Department not rendered an erroneous decision. *This is pure conjecture.*
>
> * * * * * * *
>
> "As for the reference to the borax combine and the suggestion that it prevented appellant from successfully establishing its case in 1933, this is also so speculative and conjectural that it cannot be given appreciable weight."

It is clear that the Little Placer allegations can in no way serve to rescue plaintiff's case from the statute of limitations.

II.

The Running of the Statute of Limitations Was Not Tolled by "Lack of Knowledge" by Plaintiff of Its Cause of Action or by Any "Fraudulent Concealment."

A. "LACK OF KNOWLEDGE" DOES NOT TOLL THE STATUTE OF LIMITATIONS IN A TREBLE DAMAGE SUIT, AT LEAST IN THE ABSENCE OF "FRAUDULENT CONCEALMENT."

Fundamentally, and in the absence of some exception, statutes of limitations begin to run from the moment a cause of action

arises, whether the wronged party knew that he had a cause of action or not, and even if he did not know the identity of the wrongdoer. *Rose v. Dunk-Harbison Co.,* 7 C. A. 2d 502; *Lattin v. Gillette,* 95 Cal. 317; *Scafidi v. Western Loan & Bldg. Co.,* 72 C.A.2d 550, 556 (hearing by S. Ct. denied); *Neff v. New York Life Ins. Co.* 30 Cal. 2d ..... (30 A. C. 161, 167, citing *Scafidi* case).

This Court announced the same rule in a treble damage suit under the antitrust laws: "Mere ignorance of the injury complained of, or of the facts constituting such injury, will not prevent the running of the statute." *Foster & Kleiser Co. v. Special Site Sign Co.,* 85 F.2d 742 at 752 (9 Cir.).

There is a statutory exception in the case of actions for "relief on the ground of fraud"; there the statute does not begin to run until discovery (California *C.C.P.,* Section 338, Subd. 4). But a suit under the Sherman Act is not such an action. In *Foster & Kleiser Co. v. Special Site Sign Co.,* supra, this Court rejected the contention that it was. It held that *C.C.P.* Sec. 338, subd. 4, applies only when fraud is the gravamen of the action, and that such is not the case in a Sherman Act suit.[16]

Again, in *State of Oklahoma v. American Book Company,* 144 F.2d 585, also a treble damage suit under the Sherman Act, in which the action was held barred by limitations, the Circuit Court of Appeals for the Tenth Circuit cited *Foster & Kleiser,* supra, and declared that

> "The running of the statute was not tolled by the non-discovery of the claim. The claim was not one for fraud

16. It is worthy of note that in 1933 the California legislature amended *C.C.P.* Sec. 338, subd. 4, by extending the rule applicable to "an action for relief on the ground of fraud or mistake" to actions for relief on the ground of conspiracy, thus providing that the statute should not run until discovery of the facts constituting the conspiracy. But the very next session of the legislature in 1935 deleted the reference to conspiracy, a clear exposition that conspiracy is not fraud within the meaning of the statute.

within the meaning of [the Oklahoma statute of limitations identical with C.C.P. Section 338, subd. 4]."

Plaintiff also relies on a non-statutory exception that the running of the statute may be tolled in some cases if there has been "fraudulent concealment" by the wrongdoer. In *Cummings v. Board of Education,* 190 Okl. 533, 125 Pac. 2d 989 at 993, the court held that the doctrine of fraudulent concealment may not be extended to an action for damages created by statute which, though remedial as to the plaintiff, is penal as to the defendant. This case was cited with approval by the Tenth Circuit in *State of Oklahoma v. American Book Company,* supra, where fraudulent concealment was alleged in an amended complaint.

If, however, the doctrine of "fraudulent concealment" may be applied in a proper case to a damage suit under the anti-trust laws, this is not such a case. We contend:

(1) That no facts constituting fraudulent concealment were alleged in the complaint; and

(2) That the evidence conclusively demonstrated that there was no "fraudulent concealment."

B. THE COMPLAINT DOES NOT ALLEGE ANY FACTS CONSTITUTING FRAUDULENT CONCEALMENT BUT ON THE CONTRARY NEGATIVES ITS EXISTENCE.

Violation of the anti-trust law is, of course, not itself fraudulent concealment. *State of Oklahoma v. American Book Company,* supra; *Foster & Kleiser v. Special Site Sign Co.,* supra.

The cases on "fraudulent concealment" all emphasize the existence of fiduciary and confidential relationships (e.g., *Neff v. New York Life Ins. Co.,* 30 Cal. 2d ..... (30 A. C. 161, 169)),[17] and it is a rare case where the statute has been held

17. *Pashley v. Pacific Electric Ry. Co.,* 25 Cal. 2d 226, emphasizes (at 233 and 235) the existence of a confidential and fiduciary relationship arising from the fact that defendants' agent and the plaintiff occupied the relationship of physician and patient.

to be tolled on the doctrine of fraudulent concealment in the absence of such a relationship.

In the present case there was no fiduciary relationship between the plaintiff and defendants. Indeed, if reference be made to the evidence, it will be seen that for years plaintiff had distrusted defendants, believed them to be dishonest, was engaged in litigation with one of them and was threatening litigation against all of them (see, e.g., pages 9-11, 22-23, 26-28, 33-35, 37-43, supra).

Consequently, "Mere silence on the part of the [defendants] would not constitute, under well settled principles, a fraudulent concealment." *Kimball v. Pacific Gas & Electric Company,* 220 Cal. 203, 217; *Foster & Kleiser Co. v. Special Site Sign Co.,* supra.

As said in the case of *Daily Telegraph Company v. Long Beach Press Publishing Co.,* 133 Cal. App. 140 (hearing by Supreme Court denied), where an appellant whose complaint had been dismissed on demurrer sought to excuse failure to make earlier discovery by alleging that the "defendant kept secret and concealed the true facts":

> "It is the well-established rule, however, that *in the absence of an allegation of affirmative acts in the nature of artifice to conceal the facts, a complaint is deficient in this respect.* The rule has been expressed in the case of Phelps v. Grady, 168 Cal. 73, at page 78 [41 Pac. 926, 928], by quoting from Wood v. Carpenter, 101 U. S. 135 [25 L. Ed. 807], as follows: '* * * *Concealment must be the result of positive acts. Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry.*' "

Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203, involved a fiduciary relationship under the Workmen's Compensation Act. Thereunder the employer is entitled to recover from a third party for the employee's damage, the recovery in excess of amounts expended by the employer are held by it for the employee, and the employer may not settle without the employee's consent. In spite of this relationship the employer negotiated a settlement and concealed from the employee the fact that a third party was responsible (cf. p. 217).

The other cases cited by plaintiff all involve conventional fiduciary relationships.

To the same effect, *Scafidi v. Western Loan & Bldg. Co.*, 72 C. A. 2d 550, 562, 563.

The Burden Is on a Plaintiff to Plead and Prove a Valid Excuse for Delay in Suit; Facts, Not Conclusions, Must Be Alleged

Where an action is brought more than the statutory period after the cause of action arose, the plaintiff has the burden of pleading and proving a legal and valid excuse for its delay. The burden of pleading and proving fraudulent concealment is on the party who claims fraudulent concealment. *Strout v. United Shoe Machinery Co.*, 208 Fed. 646 (an antitrust case, cited by this Court in the *Foster & Kleiser* case); *Kimball v. Pacific Gas & Electric Co.*, 220 Cal. 203, 215; *Pashley v. Pacific Electric Railway Co.*, 25 Cal. 2d 226, 230. This burden is quite rigorous and requires a plaintiff to plead facts, not conclusions,[18] and the allegations "must be construed most strongly against the pleader." *Prentiss v. McWhirter*, 63 F.2d 712 (9 Cir.). The principles need not here be elaborated, because it is clear, both from the complaint and from the evidence offered by plaintiff,[19] what plaintiff's excuse was, and it is equally clear that it was not good in law.

Denial of a Claim or of an Accusation of Wrongdoing Is Not Fraudulent Concealment

The only factual allegations relative to fraudulent concealment are in paragraph 75 of the complaint (R. 46). It is there

18. *Vertex Investment Co. v. Schwabacher*, 57 C.A.2d 406 (Hearing by Supreme Court denied); *Lady Washington Consolidated Co. v. Wood*, 113 Cal. 482; *Wood v. Carpenter*, 101 U.S. 135 at 140; *Collins v. The Texas Company*, 123 Cal. App. 60; *Consolidated R. & P. Co. v. Scarborough*, 216 Cal. 698; *Daily Telegram Co. v. Long Beach Press Publishing Co.*, 133 Cal. App. 140; *Turman v. Holmes*, 29 C.A.2d 198; *Haley v. Santa Fe Land Improvement Company*, 5 C.A.2d 415 (judgment reversed with instructions to sustain demurrer); *Moore v. Boyd*, 74 Cal. 167; *Johnson v. Ehrgott*, 1 Cal. 2d 136; *Myers v. Metropolitan Trust Company*, 22 C.A.2d 284; *Shonts v. Hirliman*, 28 F. Supp. 478 (S. D. Cal.).

19. In *Neff v. New York Life Ins. Co.*, 30 A.C. 161, the action was dismissed on plaintiff's offer of proof.

alleged that in May 1929 George Burnham called on C. B. Zabriskie, manager of the defendant PCB, and

> "protested against the said cuts made by defendants in the price of borax and charged said defendants with so doing for the purpose of eliminating, and with the intent so to do, plaintiff from its operations at Searles Lake and from any competition with the products of defendants"

and that Zabriskie denied the accusation.

Thus in 1929, sixteen years before the suit was instituted, the plaintiff accused one of the defendants of having conspired to cut the price of borax for the purpose of eliminating the plaintiff. This very fact, demonstrating plaintiff's belief and state of mind 16 years ago, is enough to show that the action is barred by limitations.

The excuse for not suing amounts to nothing more than this: the plaintiff went to one of the parties whom it believed had wronged it, accused him of so doing, and the accused wrongdoer denied the accusation. Such an excuse is wholly inadequate; the fact alleged does not constitute fraudulent concealment.

A leading authority on the subject is a decision of this Court, *Feak v. Marion Steam Shovel Co.,* 84 F.2d 670 (9 Cir.), cer. den. 299 U.S. 604, which establishes that denial of an accusation of wrongdoing is not fraudulent concealment. This Court there said:

> "Restatements of the fraudulent representation do not of themselves constitute concealment, and *where a party is once put upon notice of fraud he cannot avoid the consequences of his constructive knowledge of the fraud nor fulfill his duty to investigate by going to the party he suspects of the fraud. He cannot desist from further investigation because he is reassured of the truth of the original representations.*"

To the same effect, that after a person suspects that a wrong has been perpetrated on him, he cannot stop the running of the

statute by going to the alleged wrongdoer and obtaining assurance that no wrong was committed, see

Turman v. Holmes, 29 C.A.2d 198;

Burchmore v. H. M. Byllesby & Co., 1 N.W.2d 327 (Neb. 1941);

Phillips v. Baker, 114 S.W.2d 421 (Tex. 1938) (citing the *Feak* case);

34 *Am. Jur.* 137, which states:

> "In purely business transactions, it seems to be the rule that the reaffirmance of the truth of the original statements, after notice that such statements were fraudulent, does not constitute a concealment of the fraud and so excuse delay in bringing action."

In *Neff v. New York Life Ins. Company,* 30 Cal. 2d ..... (30 A.C. 161), plaintiff appealed from a judgment dismissing an action on a disability policy because of the statute of limitations. Plaintiff claimed that the statute had been tolled by fraudulent concealment, alleging that defendant had fraudulently told the insured that he was not entitled to any benefits and that he was not permanently, continuously and wholly prevented from pursuing a gainful occupation. The Supreme Court, noting that statutes of limitations rest on sound policy and are among the most beneficent to be found in the books, said that "no mere denial of liability, even though it be alleged to have been made through fraud or mistake, should be held sufficient, without more, to deprive the insurer of its privilege of having the disputed liability litigated within the period prescribed by the statute of limitations" (p. 168). It pointed out that if the defendant's acts were to be held to constitute fraudulent concealment, no one could deny liability without indefinitely suspending the running of the statute of limitations.

As said in *Jackson v. Buchanan,* 59 Ind. 390:

> "To deny a fact, or procure another to deny it, is not a positive or an affirmative act; it is a negation. That the guilty parties should deny the act averred in the complaint,

is not calculated to conceal the fact, but rather to awaken the attention of the aggrieved party to its existence, and put him upon enquiry as to its truth; nor does it tend to avoid enquiry concerning it, but rather to invite it. To hold that the denial of a fact is such a concealment of it as would prevent the statute of limitations from running, would require all persons to admit facts, or remain silent when confronted with them, or place themselves beyond the protection of the statute."

C. THE EVIDENCE CONCLUSIVELY ESTABLISHED THAT THERE WAS NO FRAUDULENT CONCEALMENT.

1. The Special Issue Framed by the Court Below Selected for Consideration a Crucial Element in the Claim of Fraudulent Concealment, Without Which the Claim Necessarily Failed.

The plaintiff (Brief, pp. 15, et seq.) criticizes the wording of the special issue because it did not refer to "diligence" or "discovery". Since a directed verdict was granted, the wording is not of vital importance, but it serves to illustrate plaintiff's misunderstanding of the case.

Since the cause of action here is not one based on fraud, mere lack of knowledge or of "discovery" could not toll the statute. Unless there was a "fraudulent concealment", the statute would have run although plaintiff were wholly ignorant that it had a cause of action or had been "diligent" in investigating (Cf. *Scafidi v. Western Loan & Bldg. Co.,* 72 C.A.2d 550).

Now, one of the principal elements of "fraudulent concealment" is *reliance* by plaintiff on some affirmative artifice or contrivance to prevent discovery, a reliance as result of which plaintiff was lulled into inaction. In other words, the doctrine of fraudulent concealment rests on estoppel. As said in *Neff v. New York Life Insurance Company,* 30 Cal. 2d..... (30 A.C. 161, 170), the plaintiff must plead and prove "facts which would estop the defendants from asserting such defense", i.e., the defense of the statute of limitations. To the same effect is *Pashley v. Pacific Electric Railway Co.,* 25 Cal. 2d 226 at 231,

para. 3a, (relied on by plaintiff), which shows the controlling effect in a fraudulent concealment case (as distinguished from a case where the cause of action is based on fraud) of a plaintiff's *belief*. An estoppel requires *reliance* and a reliance requires *belief* (e.g., 3 *Pomeroy's Equity Jurisprudence*, 5th ed., Sec. 812, p. 230, Sec. 890, p. 502).

In short, if after the alleged Zabriskie conversation—the only alleged act of fraudulent concealment—plaintiff still believed, or subsequently again believed at any time up to the statutory period before suit was brought, that it had been damaged by acts of defendants in violation of the Sherman Act, it could not claim reliance on an alleged fraudulent concealment. That excuse goes by the board. Even could a denial be the basis of a "fraudulent concealment", one who does not accept and continue to believe the denial may not protect himself from the penalties of delay by hiding behind it any more than in an action for fraud one may recover unless actual reliance is proved. *Spinks v. Clark*, 147 Cal. 439, 444; *Smith v. Brown,* 59 C.A.2d 836.

The issue as framed by the trial court was thus far more favorable to the plaintiff than the law warranted, for it inquired whether the plaintiff had knowledge or good cause to believe, whereas mere belief would have been sufficient. The special issue was precisely the sort of thing encouraged by *R.C.P.* Rule 49(a), for it acutely singled out from a mass of facts a simple question, an affirmative answer to which would necessarily require a decision that the plaintiff was barred by limitations and thus end the case without wasting the time of the court and the litigants.

2. The Evidence Was Conclusive and Overwhelming.

The evidence emanates from the plaintiff itself, consisting—in its entirety—of statements of plaintiff. Moreover, it is all what may be called "real" evidence (Cf. I *Wigmore on Evidence,* 3d Ed., p. 396, Sec. 24), which, from the very nature of things, may not be contradicted or denied. That is to say, it does not consist of testimony, oral or written, by third parties as to

what plaintiff knew or did. It includes acts of plaintiff and written statements analogous to "verbal acts" (Cf. VI *Wigmore on Evidence,* p. 190, Sec. 1772) which are not merely evidence of plaintiff's past knowledge or state of mind but immutably constitute that knowledge or state of mind just as the mass of a mountain stands immune from any denial of its existence, the denial of which must necessarily be treated as "sham" and disregarded.[20]

It is for this reason that the trial court was well within its right and duty in directing a verdict on the special issue of fact. *Brady v. Southern Railway Co.,* 320 U.S. 476. There the court said (p. 479):

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial, the result is saved from the mischance of speculation over legally unfounded claims."

And see *Farr v. Union Pacific Railway Co.,* 106 F.2d 437 (10 Cir.).

The evidence reviewed at pages 9 to 50, supra, demonstrates that plaintiff at all times continued to believe that the defendants had caused it damage by acts in violation of the antitrust laws and that despite Burnham's alleged conversations of May 17, 1929, plaintiff remained convinced that it had a good case against the defendants. So it wrote to Thurman Arnold in 1939. The plaintiff had previously been warned by its attorney Townsend that innocent explanations of the price cuts were merely "cloaks and disguises". In its letters to the Department of Justice in 1939 and January 1940, in which it only repeated what it

20. And cf. the rule that written admissions or statements made before any controversy has arisen so far outweigh oral assertions from the witness stand to the contrary that the latter will not be treated as even raising a conflict. *In re Irvine,* 102 Cal. 606.

had been telling Senator Pittman and others throughout the entire previous decade, plaintiff itself disposed of these explanations as wholly inadequate for reasons expressed and stated as being wholly conclusive to it.

Without attempting to review all the facts that demolish plaintiff's claim of fraudulent concealment, we may note:

1. While plaintiff believed that Stephen Mather was responsible for procuring the fraud order as a tool of the defendants and to injure plaintiff, Burnham did not mention Mather or the post office fraud order to Zabriskie, and nothing was said by Zabriskie with respect to it, although at that very conversation the plaintiff's conviction on the subject was further inflamed by seeing Mather's picture on the wall, and thereafter plaintiff continued in its previous views about defendants' responsibility for the fraud order.

2. A few months after the Zabriskie conversation and in January 1930 plaintiff, in order to induce the U.S. District Court for Nevada to grant it relief, reaffirmed and amplified under oath all the accusations which it had previously made against the defendants of violation of the antitrust laws.

3. In the middle 30's plaintiff was further aroused by what it believed to be the monopolistic activities of the defendants and was warned and believed that defendants were dishonest and not to be trusted.

4. Plaintiff repeatedly accused defendants to one person or another, including attorneys consulted by him, of having committed damage to it by acts in violation of the antitrust laws, all as later charged in the complaint filed herein in 1945.

Plaintiff's brief (p. 25) seeks to put the best face possible on the facts by saying "admittedly", the evidence shows "that from time to time from 1929 Burnham became doubtful of the truth of Zabriskie's and Emlaw's assurances that their companies were not violating the law." This concession, however mild it may be, is alone sufficient to sustain the judgment. Indeed on page 22 its brief argues:

> "Furthermore, actual knowledge by a wronged party that the acts of defendants as charged in a complaint were in themselves performed and carried out in violation of the Anti-Trust laws does not constitute proof of a conspiracy formed *after* the occurrence of such acts and on which conspiracy the action is solely based." [Emphasis is plaintiff's]

This concedes that it always knew that the acts which caused its damage were in violation of the antitrust laws, but plaintiff seeks to escape the statute of limitations on the ground that it did not know of a later conspiracy formed after those acts were committed and for which it has no right to recover since no acts were done thereunder to its damage!

3. Plaintiff's Real Reasons for Not Suing Are No Excuse in Law.

(a) Lack of Funds.

Plaintiff's real reason for not suing was, as it wrote to Thurman Arnold, its lack of funds (see p. 49, supra). But lack of funds with which to sue is no excuse for delay. This Court has so held in *Gillons v. Shell Oil Co. of California,* 86 F.2d 600, 606 (9 Cir.), and *Cummings v. Wilson & Willard Mfg. Co.,* 4 F.2d 453, 454, 455, cer. den. 268 U.S. 701, following *Leggett v. Standard Oil Company,* 149 U.S. 287, 294, and *Hayward v. National Bank,* 96 U.S. 611, 618. To the same effect, *Wolf Mineral Process Corporation v. Minerals Separation North American Corporation* (4 Cir.), 18 F.2d 483, 490, cer. den. 275 U.S. 558, and *De Estrada v. San Felipe Land & Water Co.,* 46 Fed. 280, 282 (D. C. Cal.).

(b) Lack of Conclusive Evidence.

Plaintiff also excuses its delay because it had not assembled in its possession conclusive evidence. But the law does not permit a man to defer bringing suit until he has the legal evidence to prove his case. If a party believes he has been wronged, he may not defer suit until he has his proof "sewed up." Cf. *Lattin v. Gillette,* 95 Cal. 317.

A plaintiff, being convinced or believing that he has a cause of action, must sue before the statute of limitations has run and then make use of the available discovery procedures, such as taking depositions to require adverse parties to answer under oath and produce documents, demanding inspection of documents, and the like. *Scafidi v. Western Loan & Building Company,* 72 C.A.2d 550, 570; *Fidelity & Casualty Co. of New York v. Jasper Furniture Co.,* 117 N.E. 258 (Ind.); *Texas Rice Lands Co. v. McFaddin etc. Co.,* 265 S.W. 888, 890 (Tex.).[21]

Plaintiff argues that one may defer suing when he is aware of facts which make him merely "suspicious," and cites decisions where fraud is the gravamen of the cause of action and where, by the statute itself, the statute of limitations does not begin to run until "discovery."[22] In the California cases involving a claim of fraudulent concealment, the courts have repeatedly said that the plaintiff is under a duty to act when he is aware of facts that make him "suspicious." *Scafidi v. Western Loan & Bldg. Co.,* 72 Cal. App. 550, 569; *Bliss v. Martin,* 74 C.A.2d 500, 507 (hearing by S. Ct. denied); *Hobart v. Hobart Estate Co.,* 26 Cal. 2d 412, 438. But the matter re-

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21. Compare the observation in *Bowles v. Pure Oil Company,* 5 F.R.D. 300:
"* * * it cannot be contended that the law, in general, has ever been that a plaintiff's action must fail because, when he begins his suit, he does not know enough about his cause of action to establish it forthwith by competent evidence * * *. Under the old equity practice a bill of discovery could be maintained not only in aid of a pending suit but also where there was no suit in existence, but only one in contemplation. Under the Rules of Civil Procedure, Rule 27, before an action is instituted, upon a showing that the proposed plaintiff 'is presently unable to bring' the action, discovery by depositions may be had."

22. Plaintiff also cites *American Surety Company v. Pauly,* 170 U.S. 133, which does not involve the statute of limitations. That was a suit on a fidelity bond, which required notice to be given of any act which might involve loss as soon as it came to the insured's knowledge. The case turned purely on the construction of the contract which was to be construed most strongly against the party that had drafted it. "If the company intended the bank to inform it of mere rumors or suspicions, that intention should have been clearly stated in the contract."

quires no discussion, because this case is infinitely stronger than any mere matter of suspicion. It is a case of positive conviction.[23]

Under *Strout v. United Shoe Machinery Co.,* 208 Fed. 646, a treble damage suit under the antitrust laws, cited by this Court in the *Foster & Kleiser* case, a great deal less knowledge than plaintiff had here was held to defeat a claim of fraudulent concealment. That was a suit by a trustee of a corporation "to recover damages * * * from a secret conspiracy by defendants in alleged violation of the anti-trust act." The acts complained of as having injured the corporation's business consisted of buying a majority of the stock of the corporation, electing officers or directors of the defendant to form the entire board of directors of the corporation, stopping the corporation's business, and enforcing disuse of its patents by exercising the control thus acquired. The court said that "the supposition that these doings might have been fraudulently concealed does not seem to me entitled to serious consideration." In reply plaintiff argued that, while it knew of the acts done, it did not know that they were done in conspiracy and with the improper purpose but for which the plaintiff would have no cause of action under the Sherman Act. The court replied:

> "The plaintiff says that these acts were made unlawful by the purpose of the defendants, in combination, to do the above acts in restraint of trade, and that this purpose, if

23. Plaintiff cites *Hazel Atlas Glass Co. v. Hartford Empire Co.,* 322 U.S. 238, but it has no relevance. In order to help it obtain a patent of doubtful validity, Hartford's officials wrote an article praising the device as a remarkable advance in the trade, had it signed by an apparently disinterested expert, and had it published in a trade journal as his article. It then submitted the article to the Patent Office in support of the patent application. In a later patent infringement suit against Hazel Atlas, Hartford's lawyer (who had taken part in the spurious publication) cited it to the Circuit Court of Appeals in his brief, and that court quoted from the article copiously in rendering a decision sustaining the patent. This was a "deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." The Supreme Court held that diligence of Hazel Atlas in uncovering this "sordid story" was not relevant because the matter did not concern only private parties; it was "a tampering with the administration of justice," a "wrong against public legal institutions, and involved the integrity of the judicial process."

not disclosed to the trustee, was fraudulently concealed. No doubt it may be assumed that such a purpose, apart from the acts done, would not be disclosed; but, except so far as its existence is established by the alleged acts done, I do not see how it could have afforded this plaintiff any cause of action. The demurrer is sustained * * *."

In the present case plaintiff admitted that it knew that it had sustained damages and knew that the defendants had caused that damage, and the only thing it even claims that it did not know was that the defendants had acted in conspiracy (Cf. Burnham affidavit, R. 125, lines 3-6). This excuse is identically that rejected in the *Strout* case.

4. Answer to Other Contentions of Appellant.

(a) Re Burden of Proof.

Plaintiff argues (Brief, p. 36) that the burden of proof on the special issue was on defendants, and that defendants offered no evidence. The gross error of the claim that we offered no evidence has already been noted (p. 7, supra). The question of burden of proof is of no importance since the evidence was overwhelming, and questions of burden are important only when evidence is evenly balanced. However, the law is clear that the burden of proof was on the plaintiff (see p. 69, supra), *and plaintiff assumed it voluntarily* (pp. 53-54, supra).

(b) Re Criticism of the Date in the Special Issue.

Plaintiff's brief (p. 22) criticizes the special issue because it refers to "knowledge" or "cause to believe" as of May 17, 1929. The plaintiff argues that it relies on a conspiracy formed "some six months after May 17, 1929" and asks how it could know or have cause to believe in May what had not yet happened.

This is an amazing argument. It was the plaintiff who imported into this case the date May 17, 1929 by contending that the statute of limitations was tolled by a "fraudulent concealment" worked on that date. This, it asserted in the trial court,

was its sole "excusatory fact" (see p. 54, supra). If, as plaintiff now claims, it sues only on a conspiracy formed after May 1929, nothing in that month could have been a fraudulent concealment of a cause of action that had not yet arisen. There being no claim of any act of fraudulent concealment after the alleged conspiracy was formed, there could be nothing to toll the statute and the action would have clearly been barred long ago.

(c) Re Claim That Evidence of Concealment Was Rejected.

Plaintiff's brief (at p. 28) contains a topic heading, "Evidence of Concealment was Admissible," but no evidence of this character is identified in the subsequent discussion as having been rejected, and in the Specification of Errors (Brief, pp. 11-13) no error in exclusion of evidence is stated.

Elsewhere in its brief (pp. 25, 26) plaintiff refers to certain letters which the trial court rejected. These letters, purportedly written by an employee of PCB to one Gauge in 1935 and 1937, had not the faintest connection with plaintiff. Gauge had a contract with PCB to buy borates for resale in the Orient (R. 436). Two of the letters, referring to the Japanese trade, contained a request that they be destroyed. In rejecting the offer the trial court said (R. 440):

> "the issue in this case is whether or not, as you have alleged it, there is any unlawful concealment as to the cause of action of this plaintiff, and that entails transactions between the plaintiff and the defendants and not between third parties and the defendants."

A destruction of records or any act of that character which did not come to the plaintiff's attention and did not interfere with any inquiry or investigation on its part is obviously irrelevant. Nothing in records which it never saw or asked to see could have misled it or could possibly be called a trick or contrivance intended to exclude suspicion. *Vertex Investment Co. v. Schwabacher,* 57 C.A.2d 406, 413, 416.

Moreover, the Gauge letters were written more than six years

after plaintiff's alleged cause of action had accrued, and plaintiff was already barred by the statute of limitations. Acts occurring after the statute of limitations has begun or has run are irrelevant, whether they are "concealment" or "fraudulent" or not. *Vertex Investment Company v. Schwabacher,* 57 C.A.2d 406, 420; *Del Campo v. Camarillo,* 154 Cal. 647; *Scafidi v. Western Loan & Building Co.,* 72 C.A.2d 550 at p. 561.

(d) Re Refusal of Court to Permit Plaintiff to Read Complaint to the Jury.

Plaintiff's contention (Brief, p. 30) that it was error for the court to refuse to permit the *whole* complaint to be read to the jury is footless, since the case was taken from the jury. Moreover, the court's ruling was correct; plaintiff's purpose in wanting to read the discursive complaint (52 pages when printed) was to inflame the jury so as to prevent it from giving fair consideration to the only issue that was to be submitted to it. The court had given to the jury an adequate explanation of the case, sufficient for their understanding of that restricted issue (cf. R. 321-324).

If a general answer had been filed, whatever was not denied would have been deemed admitted, but by permission of the court the defendants' answers were special and were confined to the allegations pertinent to the statute of limitations. Therefore they did not admit any allegations on the merits.

The trial court had expressed its attitude at the pre-trial conference, thus:

> "The jury should not be concerned in this case with whether the defendants violated the Antitrust Law, whether they are good people or bad people, nor should the jury be concerned with who the plaintiff is, whether he is a good man or a bad man, whether he conducted himself properly or whether he had bouts with the law, or not." (R. 264)

So faithful to this view was the court that it even excluded the Post Office fraud order when offered by defendants (see R. 405, 406, Def. Ex. C for Identification).

CONCLUSION

If ever an action was barred by the statute of limitations, this, we submit, is it. We respectfully submit that the judgment is correct and should be affirmed.

Dated: San Francisco, California, April 26, 1948.

MAURICE E. HARRISON
MOSES LASKY
BROBECK, PHLEGER & HARRISON
GURNEY NEWLIN
PAUL SANDMEYER
NEWLIN, HOLLEY, SANDMEYER & TACKABURY.
Attorneys for appellees Borax Consolidated, Ltd., Pacific Coast Borax Company and United States Borax Company.